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[illegible] United States

[illegible], PETITIONER

[illegible], ET AL.

[illegible] TO THE UNITED STATES [illegible]

[illegible]

[illegible],
Solicitor General,
[illegible],
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM J. BROSNAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 26a–35a) is reported at 164 F. Supp. 357. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 10–17) is reported at 264 F. 2d 762.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1959. (Appendix A, *infra*, p. 17.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a sheriff's sale of real property in execution of a judgment confessed by a mortgagee in a state court extinguishes a junior federal tax lien on the property where the United States had not been joined as a party to the proceeding pursuant to federal statute.

STATUTES INVOLVED

The statutes involved, Sections 6321, 6322, 6323(a), 6325 (a), (b) and (d), 7403 and 7424 of the Internal Revenue Code of 1954 and 28 U.S.C. 2410 are printed in Appendix C, *infra*, pp. 32–38.

STATEMENT

The facts are undisputed and are fully detailed in the opinions of the District Court (R. 26a–35a) and the Court of Appeals (Appendix A, *infra*, pp. 10–17). They may be summarized as follows:

The taxpayers are George H. and Gladys M. Parkman and the Mountain Engineering Company, a corporation controlled by the Parkmans. On January 28, 1948, the Parkmans purchased from J. D. and Martha M. Berg 175 acres in Moon Township Pennsylvania. In making this purchase the Parkmans executed a purchase money mortgage in the sum of $45,000, and a mortgage bond in the sum of $90,000. The property was conveyed back and forth between the Parkmans and the Mountain Engineering Company a number of times, the conveyances all being subject to the purchase money mortgage. (Appendix A, *infra*, pp. 10–11.)

At a time when the corporation owned the property, certain federal tax liens attached to it and were recorded. Subsequently, an additional tax lien arising from a tax liability of the Parkmans attached to the property at a time when they owned the property. The tax liens were all junior to the mortgage. (Appendix A, *infra*, p. 11.)

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955, caused a confession of judgment to be entered on the bond in the amount of $43,135 plus interest from June 1, 1955. A writ of fieri facias for the sale of the property was issued to the sheriff, but the sale was postponed while the surviving mortgagee petitioned for and received from the Pennsylvania Court of Common Pleas a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings under the consent provisions of 28 U.S.C. 2410. No answer was filed and an order issued purporting to join the United States as a party to the proceedings. During the intervening time William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest. (Appendix A, *infra*, p. 11.)

The property was sold by the sheriff on January 3, 1956, and was bid in by Brosnan and Jacob for $6,203. This amount covered only the cost of the sale and outstanding local taxes. On January 3, 1957, the Government attempted to redeem the property under 28 U.S.C. 2410(c) by tendering to Brosnan a check for $6,575.42 representing the amount bid at the sheriff's sale, plus interest. This tender was re-

fused as totally inadequate in amount. (Appendix A, *infra*, pp. 11–12.)

The United States brought the present action in the federal district court on July 12, 1957, seeking alternative relief. First, under Section 7403 of the Internal Revenue Code of 1954, the Government sought to foreclose its liens by asking the District Court to determine the relative priorities of liens and to order a sale of the property and distribution of the proceeds in accordance with the determined priorities. Alternatively, in the event the District Court found that the Government had been joined as a party to the confessed judgment and execution sale, the Government prayed for a decree that a proper redemption from the sale had been executed. (R. 26a.)

The District Court refused to grant either form of requested relief and dismissed the Government's complaint. It held that the United States was not made a party to the foreclosure proceedings within 28 U.S.C. 2410, since judgment was already entered when the rule to show cause issued. However, it went on to conclude that the tax liens were nevertheless extinguished by the sale of the property on execution. Finally, it held that even if the Government had a right to redeem the property under 28 U.S.C. 2410(c), the attempted redemption was insufficient in amount. (R. 26a–35a.)

The Government's appeal was limited to the issue of whether its federal tax lien could be extinguished in the quasi-judicial confession of judgment foreclosure and sale when it had not been properly joined as a party. The Court of Appeals affirmed, holding

that joinder of the Government in such a proceeding is necessary only where local law requires it, and that under local law the Government's tax liens were extinguished by the foreclosure of a security interest prior in time to the tax liens. (Appendix A, *infra*, pp. 12–17.)

REASONS FOR GRANTING THE WRIT

1. Four Courts of Appeals have considered the question of whether junior federal tax liens on real property are extinguished when the property is sold in foreclosure of senior mortgages under a state procedure which does not require the joinder of junior lienors in a judicial proceeding. Thus far the courts are evenly divided. In the instant case and in *United States* v. *Boyd*, 246 F. 2d 477 (C.A. 5), certiorari denied, 355 U.S. 889, it was held that the junior tax liens were wiped out by a foreclosure sale under a senior mortgage. However, the Ninth Circuit in *United States* v. *Bank of America Nat. Trust & Savings Assn.*, decided February 2, 1959, opinion on rehearing decided May 1, 1959, Appendix B, *infra*, pp. 18 to 31, and the Sixth Circuit in *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311, certiorari denied, 310 U.S. 630, reached a contrary result, holding that once federal tax liens attach to the property they may be removed only in accordance with applicable federal statutes.[1] Accordingly, the latter cases hold, in the absence of a procedure sanc-

[1] Sections 6325, 7403 and 7424 of the Internal Revenue Code of 1954, Appendix C, *infra*, pp. 32–36. See also, 28 U.S. C. 2410, Appendix C, *infra*, pp. 36–38.

tioned by the applicable federal statutes, that the tax liens are unaffected by such foreclosure sales and remain for enforcement in later proceedings. See also *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9, 12 (C.A. 3); *United States* v. *City of Greenville*, 118 F. 2d 963 (C.A. 4); *Jones* v. *Tower Production Co.*, 120 F. 2d 779 (C.A. 10); *Miners Sav. Bank of Pittston, Pa.* v. *United States*, 110 F. Supp. 563, 570 (M.D. Pa.). The fact that the *Boyd, Metropolitan Life Ins. Co.* and *Bank of America* cases involved a power of sale contained in a mortgage while the instant case involves a sale in execution of a confessed judgment is not a controlling distinction. The legal principles involved are identical, the divergence of judicial opinion expressed in these cases cannot be reconciled, and the conflict has been specifically recognized by the Courts of Appeals involved.[2]

2. The decision of the Court of Appeals, we believe, is erroneous.

(a) A lien for federal taxes upon all property and rights to property is created by Section 6321 of the Internal Revenue Code of 1954, Appendix C, *infra*, p. 32. This lien continues, according to Section 6322, Appendix C, *infra*, p. 32, until the liability is satisfied or becomes unenforcible by reason of lapse of time. However, in addition to providing for the lien for taxes, the federal statutes also provide for

[2] The District Court here recognized the conflict (R. 32a), as did the Court of Appeals (Appendix A, *infra*, p. 15, fn. 9, p. 16). See also the opinions in *Bank of America*, Appendix B, *infra*, pp. 25–26, 29, fn. 2, wherein the Ninth Circuit says that the Third and Fifth Circuits reached contrary conclusions.

its removal. Under Section 6325 of the 1954 Code, Appendix C, *infra*, pp. 32–34, the Commissioner can release the lien if the tax liability is satisfied or unenforcible. If there is a lien on the same property senior to the tax lien (the precise situation in the instant case), Section 7424 (Appendix C, *infra*, pp. 35–36) establishes a procedure whereby the senior lienor can proceed judicially to foreclose the Government's lien. Additionally, 28 U.S.C. 2410, Appendix C, *infra*, pp. 36–38, provides consent to the joinder of the United States in a foreclosure action in a State or District Court with jurisdiction over the subject matter, subject to the removal provisions of 28 U.S.C. 1444, and to strict notice requirements. Finally, the Government may proceed, as here, to foreclose its lien under Section 7403 of the Internal Revenue Code of 1954, Appendix C, *infra*, pp. 34–35. By these detailed provisions Congress has provided a complete and exclusive system for the removal of Government liens, and the Court of Appeals erred, we believe, in its conclusion (Appendix A, *infra*, p. 14) that these provisions were not intended to be of general application.[8]

(b) Both the District Court (R. 34a) and the Court of Appeals (Appendix A, *infra*, p. 11) recognized that the tax liens attached to the real property involved in this case, but went on to hold that these liens were divested in the subsequent sale to which the Government was not made a party. Under the decisions of this Court it is well settled that a "pro-

[8] The District Court held (R. 30a) that there was a proceeding commonly used in Pennsylvania under which the United States could properly be joined as a party under 28 U.S.C. 2410.

ceeding against property in which the United States has an interest is a suit against the United States". *Minnesota* v. *United States*, 305 U.S. 382, 386; *United States* v. *Alabama*, 313 U.S. 274, 282. Since the United States was not made a party to the foreclosure proceedings, the foreclosure and sale constitute a suit against the sovereign without its consent and is therefore not binding upon the United States. *United States* v. *Clarke*, 8 Pet. 436; *United States* v. *Michel*, 282 U.S. 656; see also, opinion on rehearing in *United States* v. *Bank of America Nat. Trust & Savings Assn.*, *supra*.

(c) The Court of Appeals also erred (Appendix A, *infra*, p. 16) in following the Pennsylvania rule that the execution sale relates back to the date of the original mortgage and thus divests the Government's lien. Decisions of this Court have established that state law concepts of relation back cannot effect an extinguishment of federal tax liens. See e.g. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50.

3. The question presented in this case does not involve priority of liens. The Government concedes that its tax liens are junior and that it is entitled only to whatever excess remains after satisfaction of the prior mortgage. However, it should be entitled to that excess. As the situation now stands the decision below amounts to a holding that a mortgagee may proceed in an *ex parte* manner to obtain a confessed judgment and hold an execution sale, without making the United States a party, and, unless the Government learns of the sale and buys in, it is forever precluded from collecting any taxes from this prop-

erty, regardless of the fact that the property may have a considerable value in excess of the prior liens. The result is that the Government's liens are extinguished in the same proceeding by which the prior lienors receive a windfall. Such an anomalous result can be easily avoided by following the exclusive statutory procedures provided by Congress for the removal of federal liens.

CONCLUSION

The question presented vitally affects many property transactions throughout the country and is important to the uniform collection of taxes. The decision below is admittedly in conflict with the holdings of other Courts of Appeals and involves an important question of federal law decided in a way in conflict with the applicable decisions of this Court.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
A. F. PRESCOTT,
JAMES P. TURNER,
Attorneys.

JUNE 1959.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 12711

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN AND MOUNTAIN ENGINEERING COMPANY, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1958

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed March 26, 1959)

By MCLAUGHLIN, *Circuit Judge.*

On January 28, 1948, Martha M. Berg and her husband, J. D. Berg, conveyed to George H. and Gladys M. Parkman 175 acres in Moon Township, Pennsylvania. The Parkmans gave back a purchase money mortgage in the sum of $45,000 which was duly recorded and a mortgage bond in the sum of $90,000. Thereafter the property was conveyed a number of times back and forth between the Parkmans and Mountain Engineering Company, a corporation con-

trolled by the Parkmans; these conveyances were all subject to the purchase money mortgage.

During a period when the corporation owned the property certain federal tax liens attached to it and were recorded. Thereafter an additional federal tax lien arising from a tax liability of the Parkmans attached to the property and was recorded at a time when the Parkmans held the property. The tax liens were all junior to the mortgage.

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955 caused a confession of judgment to be entered on the bond. The judgment was for $43,135 plus interest from June 1, 1955. Subsequently a writ of fieri facias for the sale of the property issued to the sheriff; upon application, however, the sale was postponed and the surviving mortgagee petitioned the Pennsylvania Court of Common Pleas for a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings. The rule was granted and served upon the United States. No answer was filed, so eighty-nine days after service the United States was made a party to the proceedings. During the intervening time William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest.

The sheriff held the sale of the property on January 3, 1956; it was bid in by Brosnan and Jacob for $6,203 and, it is presumed, the discharge of the mortgage indebtedness. The amount of the bid went to satisfy costs of the sale, and for various outstanding local taxes.

On January 3, 1957, one year after the sale the government attempted to redeem the property [1] through the tender by an agent to Brosnan of a check for $6,575.42, which represented the amount bid at the

[1] 28 U.S.C. 2410(c) (1952).

sheriff's sale, plus interest. Brosnan refused it as totally inadequate to effect a redemption. Brosnan and Jacob have since claimed that an effective redemption would have required a tender of $55,591.28, the amount of their asserted interest in the property.

The United States subsequently brought this action under § 7403, Internal Revenue Code of 1954,[2] to enforce its lien. The district court thus was presented with the question of whether the government lien was still enforcible.

The court held, 164 F. Supp. 357 (W.D. Pa. 1958), that the United States had not been made a party to the foreclosure proceedings in the state court by the attempted invocation in that proceeding of 28 U.S.C. § 2410 (1952) because no attempt was made to bring in the United States until after judgment had been entered on the confession of judgment. But [illegible] that the lien had nonetheless been divested simply by reason of its being a junior lien.

The government argues that § 7403, Internal Revenue Code 1954, footnote 2 supra, directs and requires that a decree for sale of the property in question be

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[2] That section reads in pertinent part:

"(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof * * * the Attorney General * * * may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States * * *."

"(c) *Adjudication and decree.*—The court shall * * * proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States."

entered here. It is plain, however, that a sale may be decreed only "* * * where a claim or interest of the United States * * * is established." Thus the issue presented is whether after the sale on execution following the confession of judgment the United States still held any interest in the property.

For its claim that it continued to hold an interest in the property, the government's basic premise is that once a lien has been established by federal law it remains until it is satisfied or becomes unenforcible by lapse of time. The government asserts that the lien can be satisfied other than by payment only by compliance with one of a number of other federal statutes.[3] It is urged that when these statutes are taken together a plain intent on the part of the Congress to furnish exclusive means for removal of federal liens is made out. Since assertedly none of these provisions has previously been complied with, the government concludes that the lien remains for enforcement in this proceeding.

The claim advanced by the government that state law in no way controls federal tax liens which have attached to property is too broad;[4] the cases cited for this proposition stand more narrowly for the tenet that the priority of a lien of the United States for unpaid taxes relative to other liens always involves a federal question.[5] In this case there is no question

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[3] § 6322, Internal Revenue Code, 1954; § 3671 Internal Revenue Code, 1939.

[4] §§ 6325, 7403, 7424, Internal Revenue Code, 1954; 28 U.S.C. § 2410 (1952).

[5] Reliance in this case on *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9 (3 Cir. 1948) is misplaced, since the lien held by the United States there was superior to all others.

[6] E.g., *United States* v. *New Britain*, 347 U.S. 81 (1954); *United States* v. *Texas*, 314 U.S. 480 (1941); *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178 (3 Cir. 1956).

of priority, it being conceded that the liens of the United States were junior.

For its conclusion that the federal statutes make out a scheme by which Congress intended to furnish the only means for extinguishing even junior liens held by the United States, the government has relied heavily on the legislative history of what is now 28 U.S.C. § 2410 (1952).[7] The House Report[8] states that without the legislation involved there is no way in which a cloud upon title caused by a junior lien held by the United States can be removed when a prior mortgage is being foreclosed, since there is no statute to authorize making the United States a party to such a proceeding. The government would conclude from this that a junior lien in favor of the United States remains unaffected when foreclosure of the senior lien is had without making the United States party thereto.

But this court has already held that the purpose of § 2410 was to permit the joining of the United States in foreclosure proceedings on a more senior lien in jurisdictions where joinder would be necessary for estopping the junior lienor from thereafter asserting his claim. *United States* v. *Cless*, 254 F. 2d 590 (3 Cir. 1958). The Cless case decided that where, as in Pennsylvania, such joinder was not necessary to divest a junior lien, the United States did not have to be joined in order to divest its junior lien. We conclude that the government's position is not convincing and that Congress never intended government-held junior liens not to be subject to divestment by foreclosure proceedings carried out in the state courts

[7] 46 Stat. 1528 (1931).

[8] H. Rep. No. 95, 71st Cong. 2d Sess.

without joinder of the United States.* Thus state law must be looked to in order to determine those rights and incidents arising from the federally created lien which are not prescribed by federal law. See *United States* v. *Bess*, 357 U.S. 51, 55 (1958).

In *United States* v. *Boyd*, 246 F. 2d 477, 483 (5 Cir. 1957), cert. den. 355 U.S. 899, a case closely similar to this one, the court perceptively pointed out that it is the consequence of the "* * * prior lien and the right of enforcement under it, which destroys the junior encumbrance whether it be a private or Federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination * * * that this has been the effect of enforcement of the senior lien."

Pennsylvania law requires no more notice to junior lienors than is afforded by publication before subjecting their liens to extinguishment by sale of the property under the writ of fieri facias which was issued in this matter. Pa. Stat. Ann. tit. 21, § 804; tit 12, §§ 2441–2444. Whether this form of notice might raise constitutional questions of due process under *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), when the identity of persons holding a junior interest in the property is or should be known to the senior mortgagee is of no concern in the present situation; it is clear that notice of this foreclosure was given to the United States.

The buyer at the Pennsylvania sheriff's sale takes the same estate as was held prior to execution by the

* We cannot agree with the decision of the Ninth Circuit (which is based on an assumption to the contrary) in *United States* v. *Bank of America National Trust & Savings Association*, ——F. 2d——, opinion filed February 2, 1959.

one for whose debt the property is sold. Pa. Stat. Ann. tit. 12, § 2447. When the execution is on a judgment for a mortgage debt, the execution relates back to the time of giving the mortgage. *West Arch Building & Loan Assn.* v. *Nichols,* 303 Pa. 434 (1931); *Moore* v. *Schell,* 99 Pa. Super. 81 (1930). The United States consequently retains no interest in the property.

The government suggests that *Metropolitan Life Insurance Co.* v. *United States,* 107 F. 2d 311 (6 Cir. 1939), rather than the Boyd opinion, expresses the law for this case. But in that decision the court conceived of the proceeding as one for the divestiture of an existing lien, rather than as one to determine the more basic question of the very existence of the lien.[10]

A question remains as to whether the United States had any right to redeem the property under 28 U.S.C. § 2410(c) (1952), and if it did, whether the right was effectively exercised by the tender of only $6,575.42. Without dealing with the effect of the government's present argument regarding inapplicability of the section to this case and so passing the question of whether a right of redemption is conferred only when foreclosure occurs under § 2410, it is plain in any event that the tender was insufficient in amount. One

[10] For adverse comment on *Metropolitan Life Insurance Co.* v. *United States, supra,* see Notes, 53 Harv. L.R. 894 and 49 Yale L.J. 1106. At pp. 1108 and 1109 of the latter it is said: "in arriving at its result, the majority failed to distinguish between releasing a specific lien and adjudicating a specific lien to be non-existent. Under this view, an income tax lien once it has properly attached, assumes some absolute status, destructible only upon submission of the premises to resale, in accordance with the provisions of the statute. Destructibility of the tax debtor's interest, by reason of limitation on its extent, and consequent failure of the lien for want of a res are ignored as possibilities."

who seeks to redeem is proceeding on the hypothesis that the mortgage has never been foreclosed as to him. He can lift the mortgage only by paying it in full. *Collins* v. *Riggs,* 81 U.S. (14 Wall.) 491 (1872). It is undisputed that the unsatisfied mortgage debt for which the property was sold amounted to $43,135 plus interest.

Since the United States has demonstrated no right to the property, the judgment will be affirmed.

A true Copy:
Teste:

CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

[Caption omitted.]

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

MARCH 26, 1959.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 16034, Feb. 2, 1959

UNITED STATES OF AMERICA, APPELLANT,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before HEALY and CHAMBERS, *Circuit Judges*, and JAMESON, *District Judge*

JAMESON, *District Judge:*

Appellee was the owner and holder of a deed of trust and two chattel mortgages executed on February 13th and April 9th, 1953, covering property of Sierra Wood Products Corporation. In February and April, 1954, appellant filed notices of lien for unemployment withholding taxes owed by this corporation. Upon default in the performance of the obligations secured by the deed of trust and chattel mortgages, appellee foreclosed the trust deed pursuant to power of sale therein contained and the chattel mortgages pursuant to a pledgee's power of sale and the provisions of the chattel mortgages. It was stipulated that all "necessary and proper procedures" for these foreclosures "were duly performed," and the property was sold at public auction on March 15th, 1956. No actual

notice of the sale was given appellant, and no request for notices of sales or default was filed for record as provided in Cal. Civ. Code § 2924(b).[1]

On May 3, 1957, appellee instituted this action to quiet title in the Superior Court of the State of California, in and for the County of Calaveras. Appellant removed to the United States District Court for the Northern District of California, Southern Division, pursuant to 28 U.S.C.A. § 1444. Both parties filed motions for summary judgment. The District Court granted the motion of appellee and entered judgment decreeing the liens of the United States extinguished.

Two contentions were advanced by appellant: (1) that the District Court lacked jurisdiction; and (2) assuming jurisdiction, the court erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

The California Constitution conferred jurisdiction of the subject matter upon the Superior Court of Calaveras County.[2] By 28 U.S.C.A. § 2410, the United States consented to be sued in the State

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[1] This section provides for filing request for a copy of notices of default and sale under deed of trust with power of sale and for mailing copy of such notices to person filing request.

[2] "The Superior Court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided * * *) * * *

"* * * all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. * * *" (Article VI, Sec. 5).

Court.[3] The District Court acquired jurisdiction upon removal pursuant to 28 U.S.C.A. § 1444.[4]

It is true, as the Government contends, that Section 2410 does not confer jurisdiction upon district courts to entertain quiet title actions, but simply waives sovereign immunity from suit.[5] Nor may federal jurisdiction be predicated merely on the fact that the United States is a party.[6] Here, however, the state court in which the action was instituted had jurisdiction, and appellant invoked jurisdiction in the federal courts by removal.

Appellant contends that the remedy provided in Section 7424, Int. Rev. Code of 1954[7] is the exclusive method of clearing title to property covered by a federal tax lien. This section provides that the holder of a prior lien or interest of record "or any person purchasing the property at a sale to satisfy such prior lien or interest," may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section

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[3] "Under the conditions prescribed in this section and section 1444 of this title * * * the United States may be named a party in any civil action or suit * * * in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (§ 2410(a)).

[4] "Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." (§ 1441).

[5] *Wells* v. *Long*, 9 Cir. 1947, 162 F. 2d 842; *Seattle Association of Credit Men*, 9 Cir. 1957, 240 F. 2d 906.

[6] *Wells* v. *Long*, 9 Cir. 1947, 162 F. 2d 842.

[7] 26 U.S.C.A. § 7424.

7403.[8] If suit is not authorized within six months, "such person or purchaser" may file a petition in a United States District Court for leave to file a civil action for a final determination of all claims to or liens upon the property. After a full hearing, the district court "may in its discretion" enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

28 U.S.C.A. § 2410[9] specifically provides that the United States may be named as a party defendant in an action to quiet title or foreclose a mortgage on which the United States has a mortgage "or other lien." It provides in subsection (d) that the holder of a lien upon property on which the United States has a "junior lien other than a tax lien" may make written request to have the lien extinguished in the same manner as a tax lien. This provision in subsection (d) clearly implies that subsections (a), (b), and (c) are general in nature and include tax liens.

Under Section 2410 as originally enacted in 1931, the United States gave the holder of a mortgage on real property, subject to a government lien, an additional remedy by consenting to be made a defendant in a suit to foreclose the mortgage. The provisions of the 1931 Act were expanded in 1942 to include actions to quiet title to real and personal property and actions to foreclose liens on personal property.

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[8] 26 U.S.C.A. § 7403, which provides for civil action in a district court of the United States to enforce federal tax liens.

[9] The provisions of Section 2410 were originally enacted as the Act of March 4, 1931, c. 515, 46 Stat. 1528; expanded by the Act of Dec. 2, 1942, c. 656, 56 Stat. 1028; and the present law enacted by Act of June 25, 1948, c. 464, 62 Stat. 869, and amended by Act of May 24, 1949, c. 139, § 119, 63 Stat. 105.

The provisions of Section 7424, Int. Rev. Code of 1954, were first enacted in Section 1030, Int. Rev. Code of 1924, and reenacted in Section 1127 of the Revenue Act of 1926 and Section 3679, Int. Rev. Code of 1939. The Codes of 1939 and 1954 both contained express cross-references to Section 2410.[10] It is our conclusion that Section 7424, Int. Rev. Code of 1954 and Section 2410 of Title 28 prescribe alternative remedies for removal of a federal tax lien.

In addition, administrative procedures are set forth in Section 6325, Int. Rev. Code of 1954, whereby the Secretary of the Treasury or his delegate may release the lien where the liability is satisfied, a bond is furnished, or the interest of the United States is determined to have no value.

Appellee here proceeded under Section 2410 of Title 28. It contends that the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished. The Government contends that Section 2410 requires a judicial sale, relying upon the provisions of subsection (c), which contemplate a "judicial sale" on foreclosure, give the United States, in case of real property, one year within which to redeem, and provide that the United States may ask by way of affirmative relief for foreclosure of its own lien.[11] The Bank argues

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[10] Section 3680 of 1939 Code and Section 7425 of 1954 Code, which reads: "(5) For provisions permitting the United States to be made party defendant in a proceeding in a state court for the foreclosure of a lien upon real estate where the United States may have claim upon the premises involved, see Section 2410 of Title 28 of the United States Code."

[11] Section 2410(c) reads in part: "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by

that subsection (c) relates only to foreclosure actions and not to quiet title actions.

The federal tax lien here involved was created by Section 3670, Int. Rev. Code of 1939 (Section 6321 of 1954 Code) which provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount" (with interest, penalty and costs) "shall be a lien in favor of the United States upon all property, whether real or personal, belonging to such person." Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." [12] "However, once it has been determined that state law creates sufficient interests * * * to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by the United States." [13] And, as this Court said in *Bank of Nevada* v. *United States*, 1957, 251 F. 2d 820, 824, cert. den., 356 U.S. 938, 2 L. Ed. 2d 813, 78 S. Ct. 780, "the Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

The federal tax lien attached to "all property and rights to property" belonging to the taxpayer. The

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the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *."

[12] *United States* v. *Bess*, 357 U.S. 51, 57, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

[13] *Id.* at 56, 57. See also *Fidelity & Deposit Co.* v. *New York City Housing Auth.* 2 Cir. 1957, 241 F. 2d 142, 144.

interest of a taxpayer at the time the liens attached was subject to defeasance under state law upon exercise of power of sale contained in the deed of trust.[14] But can a federal tax lien upon a mortgagor's interest in property be extinguished by the exercise of such a power of sale?

There is a conflict of authority on this question. *Metropolitan Life Ins. Co.* vs. *United States*, 6 Cir. 1939, 107 F. 2d 311, cert. den., 310 U.S. 630, 84 L. Ed. 1400, 60 S. Ct. 978, tends to support the Government's position. There, a suit was brought under R.S. § 3207, a predecessor of Section 7424, asking that a junior federal tax lien be decreed extinguished by reason of a sale of property pursuant to a power contained in the mortgage. The District Court held that the Government's lien had not been extinguished and ordered the property sold and the proceeds first applied to the mortgagee's claims and the balance, if any, paid to the Government. The Court of Appeals affirmed on the theory that the District Court had no jurisdiction to extinguish the lien other than by judicial sale, and said that the question was not "what binding effect the power of sale conferred by the mortgage had on subsequent lienors." However, it is evident from the opinion that the court did not consider the lien extinguished. The court stated that "federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal, and when such liens once attach, they may be lifted only as provided thereunder." (107 F. 2d at 313). "The United States as a sovereign may be sued only with its consent. It follows that the Congress has the power to prescribe not only the methods by which, and the conditions under which, tax liens

[14] *Carpenter* v. *Smallpage*, 220 Cal. 129, 29 P. 2d 841 (1934); *Streiff* v. *Darlington*, 9 Cal. 2d 42, 68 P. 2d 728 (1937).

on real estate may be released, but also to limit the right to sue therefor and no suit may be maintained against the United States for such purpose unless strictly within the terms of the Statute * * *, under which consent is given." 107 F. 2d at 314.[15]

On the other hand, the Fifth Circuit in *United States* v. *Boyd*, 1957, 246 F. 2d 477, cert. den., 355 U.S. 889, 2 L. Ed. 2d 188, 78 S. Ct. 261, held that the non-judicial foreclosure of a mortgage lien pursuant to a valid power of sale extinguished a federal tax lien which was inferior to the mortgage lien, and the able trial judge held for appellant on the basis of this decision. In *United States* v. *Boyd*, the court said: "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or a federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S.C.A. § 2410, or Section 7403, or a 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclosed, it cuts off all junior liens, including those of the Government." 246 F. 2d at 483.[16]

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[15] *United States* v. *Kensington Shipyard & Drydock Corp.*, 3 Cir. 1948, 169 F. 2d 9, also tends to support the Government's position.

[16] The dissenting opinion in the *Metropolitan Life* case succintly expresses the rationale of the appellee: "I am in general accord with the view of the majority as to the plenary nature of the federal power of taxation. However, I cannot concede that this power enables the United States to acquire a lien upon any greater property interest than its tax debtor owns. In the case at bar, the interest of the tax bidder was subject

In spite of its holding that the tax lien was extinguished by the non-judicial sale, the Boyd case gave effect to the provisions of § 2410(c), the court calling attention to the fact that the District Court had "read the statutes of the United States as a composite body to allow to the Government * * * the statutory right to redeem after the sale within one year." The Court of Appeals said further, "The Government's rights have been fully preserved by the right of redemption which continues for the full year, not counting the time it has been suspended during the pendency of this appeal * * *."

This portion of the Boyd opinion is criticized by both parties. The Bank argues that it was not necessary to the decision and, in effect, is inconsistent with the conclusion that the lien was extinguished. The Government suggests that since the action was not conducted under Section 2410 (but rather under Section 7403), "it is difficult to understand" how the redemption provisions of Section 2410(c) "could have any application."

We are unable to reconcile the conclusions in the Boyd case (1) that the lien was extinguished and (2) that the Government still had a right to redeem under Section 2410(c).

The Bank argues that the government lien attached only to the property rights of the taxpayer, and since those rights were subject to defeasance under the prior trust deed, the lien was subject to foreclosure in the manner prescribed in the trust deed. The Government contends that once the lien attached

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to destruction by exercise of the power of sale * * *. The tax lien attaches only to the destructible interest that remains in a mortgagor after execution of a mortgage with a power of sale." See also *United States* v. *Cless*, 3 Cir. 1958, 254 F. 2d 590; *United States* v. *Brosnan*, W.D. Pa. 1958, 164 F. Supp. 357.

to the property it could be removed only in a manner prescribed by Congress, relying upon the rule that the enforcement and removal of the lien are governed by federal rather than state law.

While the question is close, we are persuaded that the Government's position is correct. It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress. The Bank seeks to clear title under Section 2410. It would avoid the effect of subsection (c) by foreclosing under power of sale and then instituting an action to quiet title. It is conceded that in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption. May the Bank do indirectly what it could not do directly?

In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410 Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.

Appellee is not without remedy. Its interest in the property to the extent of the amount due under the

trust deed and mortgages remains prior to the federal lien.[17] It can commence an action to remove the lien under Section 7424 of the Internal Revenue Code of 1954. It can file an application with the District Director of Internal Revenue for an administrative discharge of the property from tax liens under Section 6325(b) of Title 26, U.S.C.A. It can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410. To hold for the appellee would divest the United States of its interest in property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien.

Judgment reversed.

(Endorsed:) Opinion. Filed Feb. 2, 1959.

PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals for the Ninth Circuit

No. 16034, May 1, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION, APPELLEE

ON PETITION BY APPELLEE FOR REHEARING

Before HEALY and CHAMBERS, *Circuit Judges,* and JAMESON, *District Judge*

JAMESON, *District Judge:*

Upon consideration of appellee's petition for rehearing, we have concluded that our opinion, and par-

[17] The Federal tax lien is effective only as to that portion of the value exceeding the amount of the mortgages and deed of trust.

ticularly the next to the last paragraph, requires clarification. The following is supplemental to the original opinion:

It is well settled that "a proceeding against property in which the United States has an interest is a suit against the United States".[1] It is our view that a tax lien, even though junior to a mortgage, is such an interest in property,[2] and may be divested only with the consent of the United States and in the manner prescribed by Congress.

In enacting Section 2410, Congress did more than simply provide for waiver of immunity from suit. It imposed a condition for divestiture of the property rights of the United States, i.e., a period of redemption from the foreclosure sale. If Section 2410(c) is limited to foreclosure by action, followed by a judicial sale, then a Government lien could be extinguished, without notice and without right of redemption, where the mortgagee proceeded under a power of sale; whereas, in foreclosure by action, the Government would have a right of redemption, regardless of state law—a wholly illogical result in those states, for example, which do not provide any right of redemption. In our opinion, a compliance with subsection (c) is a condition of the Government's consent to be sued in any foreclosure under Section 2410. This requires a judicial proceeding in which the Government

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[1] *United States* v. *Alabama*, 1941, 313 U.S. 274, 282, 61 S. Ct. 1101, 85 L. Ed 1327. See also *The Siren*, 1868, 7 Wall. 152, 19 L. Ed. 129; *Carr* v. *United States*, 1879, 98 U.S. 433, 25 L. Ed. 209, 211; *State of Minnesota* v. *United States*, 1939, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235; *Metropolitan Life Ins. Co.* v. *United States*, 6 Cir. 1939, 107 F. 2d 311, cert. denied 310 U.S. 630, 60 S. Ct. 978, 84 L. Ed. 1400.

[2] The Third Circuit reached a contrary conclusion in *United States* v. *Cless*, 1958, 254 F. 2d 590, and *United States* v. *Brosnan*, 1959, —— F. 2d ——.

may assert its lien and the right of redemption within one year from the date of sale.

Subsection (c) was a part of Section 2410 when the provision was added permitting the United States to be sued in a quiet title action. The purpose of that provision was to allow the clearing of real estate titles of questionable or valueless government liens,[3] but where the lien, though junior, is a valid lien, the Government's consent is predicated upon its right to assert its lien and to redeem from the sale.

The sole issue presented in this case by agreement of the parties was whether the sale under the power contained in the mortgages gave the purchaser a title free and clear of federal tax liens. In our opinion this question must be answered in the negative. A

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[3] Senate Report No. 1646, 77th Cong. 2d Sess. (1942) which accompanied H.R. 5578, the bill which amended Section 2410 in 1942, quotes a letter from the Attorney General to the Chairman of the House Committee on Judiciary, which reads in part:

"It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch* v. *Hamilton* (S.D. Calif.), 33 F. (2d) 224, and *U.S.* v. *Turner* (C.C.A. 8), 47 F. (2d) 86.

"In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgages have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

This is not the type of case suggested by the Attorney General. Here the bank itself was the mortgagee, foreclosed its

valid federal tax lien may not be extinguished in this manner.[4]

The petition for rehearing is denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed May 1, 1959.

PAUL P. O'BRIEN,
Clerk.

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mortgage with constructive, if not actual, knowledge of the Government lien, became the purchaser at foreclosure sale, and then itself instituted the action to quiet title.

[4] Legislation to clarify the procedure under Section 2410 is proposed in a comprehensive report of the Committee on Federal Tax Liens of the American Bar Association and adopted by its House of Delegates in February, 1959.

APPENDIX C

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., Supp. V, 6321)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C., Supp. V, 6322)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C., Supp V, 6323).

SEC. 6325. [As amended by Sec. 77, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) *Liability satisfied or unenforceable.*—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or

(2) *Bond accepted.*—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

(b) *Partial Discharge of Property.*—

(1) *Property double the amount of the liability.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority to such lien.

(2) *Part payment or interest of United States valueless.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

(A) there is paid over to the Secretary or

his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

* * * * * *

(d) *Effect of Certificate of Release or Discharge.*—A certificate of release or of discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

* * * * * *

(26 U.S.C., Supp. V, 6325)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(26 U.S.C., Supp. V, 7403.)

SEC. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) *Obtaining Leave to File.*—

(1) *Request for institution of proceedings by United States.*—Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) *Petition to court.*—If the Secretary or his delegate fails to authorize the filing of such

civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) *Court order.*—After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) *Adjudication.*—Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) *Costs.*—All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.

(26 U.S.C., Supp. V, 7424)

Some of the liens involved herein arose under the Internal Revenue Code of 1939. Sections 3670, 3671, 3672, 3673, 3674 and 3675 (26 U.S.C. 3670, 3671, 3672, 3673, 3674 and 3675), of the Internal Revenue Code of 1939 contain substantially the same provisions as Sections 6321, 6322, 6323 and 6325 of the 1954 Code as set forth above.

28 U.S.C.:

SEC. 2410 [As amended by the Act of May 24, 1949, c. 139, 63 Stat. 89, Sec. 119] *Actions affecting property on which United States has lien*

(a) Under the conditions prescribed in this section and section 1444 of this title for the

protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided, with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the

date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If, after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

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No. 137

In the Supreme Court of the United States

October Term, 1958

UNITED STATES OF AMERICA,

Petitioner

v.

WILLIAM J. BROSNAN, et al.

RESPONDENTS' ANSWER OPPOSING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM J. BRENNAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner

vs.

William J. Brosnan, Francis H. Jacob, Martha M. Berg, George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering Company,

Respondents

October Term, 1958

RESPONDENTS' ANSWER OPPOSING CERTIORARI

William L. Jacob and William L. Jacob, Jr., Esqs., attorneys for William L. Brosnan and Francis H. Jacob, respondents, hereby answer the petition of the United States for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

QUESTION INVOLVED

Whether a sheriff's sale of real property in a state court based on a judgment confessed on bond accompanying first lien purchase money mortgage divests junior federal tax lien when the United States is joined in the execution proceedings as a party defendant by the state court on a rule issued and served on the Government more than sixty days prior to the sale, and the Government fails to bid at the sale or act to delay the sale or transfer the proceedings to federal court and also fails to redeem the property within one year after the sale as provided in 28 U.S.C. 2410.

STATEMENT OF FACTS

Because of the prior adjudication in the District Court the facts presented by the respondents, Brosnan and Jacob, are to be accepted as true.

Brosnan and Jacob acquired, by assignment and for value, a purchase money mortgage and judgment confessed thereon by mortgagee against the mortgagor-owner. Subsequent to the purchase of the property and to the recording of said mortgage, the Government filed several tax liens for various obligations due it from the original mortgagors and a corporation owned and controlled by them to which the property had been conveyed. After default, judgment was confessed against the original mortgagors in the Common Pleas Court of Allegheny County, Pennsylvania and an execution writ of fieri facias was issued directing the Sheriff of said county to levy upon, advertise and sell said property in order to satisfy the mortgage debt, all in accordance with Pennsylvania law which has been in existence for a century or more.

After the issuance of the writ the sale thereon was postponed by order of said Common Pleas Court and a rule was taken out on the Government to show cause why it should not be joined as a party defendant. The rule was served according to law. It was returnable in sixty days. The government did nothing and eighty-nine days after its service the rule was made absolute and the Government was joined in the execution as a

party defendant. The sale was held January 3, 1956 and in accordance with law the junior tax liens of the Government were thereby divested, subject only to the redemption privileges accorded the Government by 28 U.S.C. 2410. The Government fully recognized this as a fact and attempted to redeem the property on January 3, 1957 failing only because the amount of its tender was woefully inadequate and no tender at all was made to one of the co-tenant owners.

The subject action was commenced by the Government on July 12, 1957 seeking to sustain redemption or in the alternative to have the District Court hold that its junior liens had not been divested by the execution proceedings in the Pennsylvania court. The District Court denied the validity of the attempted redemption and also concluded that the junior liens were divested from this property. Admittedly those liens continue in full force against other property still owned by the original mortgagors and their said corporation.

At the argument before the Third Circuit Court of Appeals the Government chose to abandon its effort to sustain redemption and limited the issue to the status of its junior liens. The Circuit Court affirmed the District Court as appears more fully in its opinion (Appendix A, pp. 12-17, Government's Petition).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The question of divestiture of junior federal tax liens upon execution sales on prior judgments or liens can best be settled and determined by the courts dealing with the same in the various circuits. The Supreme Court has denied certiorari on several occasions in somewhat similar cases and should do so again in this instance. Naturally, each case must in the final analysis rest on its own facts. In the instant case the facts are so confining that both the respondents and the Government could with propriety contend that it was decided by the Circuit Court "on its own peculiar facts".

1. The Government now argues only against the divestiture of its liens, admitting that its abortive attempt to redeem was futile. It claims in effect that Brosnan and Jacob, the execution creditors who bought the property at the sheriff sale, are getting a windfall because the federal liens, by the lower court decision, are divested. There is nothing wrong with advancing such an argument if it be made at the proper time. No testimony whatsoever about value was presented at the trial and certainly it is too late for the Government to inject such an argument now. It is mere conjecture. So far as the record discloses it would be impossible to say that the Government would realize one dollar if it were permitted to sell this subject property after paying the costs thereof and respondents' debt. Hence, at

this time it cannot be argued much less presumed that any windfall has resulted.

2. Execution sales in Pennsylvania should be and properly are governed by local law. The same may be said of each state in the Union. It well may be that Pennsylvania law governing sheriff sales and divestiture of liens differs from that in California or Maine or Florida. The climate, the manners and customs and the people are different in those states; why should the law be any exception? The autonomy of each state should be recognized. The Government will continue to enjoy many privileges that are not granted to its citizens, but when it seeks to protect its lien for taxes is it asking too much for it to take a place in line with other lien holders when a piece of property on which it admittedly has a junior lien comes up for sheriff sale on a first mortgage? From the very essence of the lien of a first mortgage one could conclude quite logically that a foreclosure on it would divest any and all subsequent liens. To rule otherwise in Pennsylvania would be to forfeit local laws and customs that have been in practice for over a century. Specifically, when the Government is given adequate notice of an impending sheriff sale of real estate upon which it has a junior tax lien, how can it be argued that it is infringing upon governmental prerogative to expect it to take steps to protect its lien by appearing at the sale and bidding or by asking for a stay of execution or by transferring the proceedings to a federal court? No sound argument can be advanced except to say that a federal junior tax lien is sacred, untouchable and above and beyond the scope of local law. So far as the ordi-

nary general practitioner of the law is concerned, that is unthinkable.

The question presented in this case has no bearing whatsoever on the collection of federal taxes. The question is limited and restricted solely to the divestiture of a junior federal tax lien by a sheriff sale on a prior first mortgage. Furthermore, the tax lien in the instant case is not extinguished by the execution sale; it is only divested from the subject property so as to make that property readily saleable in the open market in accordance with accepted standards and local law and custom. Such divestiture in nowise touches the collectibility of those taxes. The Government still has its lien against the original mortgagors as taxpayers and their other property and can enforce collection from them. The argument advanced by the Government about procedures to remove Government liens is all well and good if it were directed to the original mortgagors, the ones who owe the taxes. If they wanted these tax liens removed from their property, then they must follow the procedures mentioned, but that argument has no application to the respondents. They owe no money to the federal government. They are not "taxpayers" as the statute mentions.

In the cases of *United States vs. Boyd*, 246 F. 2d 477 (C.A. 5), and *Metropolitan Life Insurance Company vs. United States* (C.A. 6), certiorari was denied by your Honorable Court, 355 U.S. 889 and 310 U.S. 630. We see no reason why it should be granted in the case at bar. The decision in each of those circuits is suitable to its own locale. Even if the decision in the instant case and the decision in *United States vs. Bank*

of America (C.A. 9) are considered, it will be found that they were not decided under the same or similar state execution procedures. Each state has its own such procedure. The most that a determination of the instant case by your Honorable Court could accomplish would be to settle the question of divestiture of junior federal tax liens upon execution sales *in Pennsylvania* after confession of judgment on a bond accompanying a mortgage. Such a decision would have no salutary effect in other states which require actual notice to junior lien holders or in still other states where a redemption period follows execution. The legal principles in the above cited cases when analyzed cannot be said to be even similar, much less identical, as the Government contends.

3. The opinions of the District Court and of the Court of Appeals clearly state the grounds upon which each determined that the junior federal tax liens in the instant case were divested. Reference is made thereto as we earnestly contend that those decisions are logically correct, legally sound and should not be disturbed.

CONCLUSION

The decisions of the District Court and of the Court of Appeals for the Third Circuit merely pronounce that on execution sales in the State of Pennsylvania in conformity with local law and consistent with federal statutes, junior federal tax liens like other liens, are divested. Such a decision cannot be of na-

tional scope because of the restricted factual situation. It is local law and should be regarded as such.

Therefore, we humbly submit that this petition for a writ of certiorari, as in the Boyd case and in the Metropolitan case, supra, should be denied.

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Attorneys for Respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 137

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM J. BROSNAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 23–31) is reported at 164 F. Supp. 357. The opinion of the Court of Appeals (R. 84–89) is reported at 264 F. 2d 762.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1959. (R. 90.) The petition for a writ of certiorari was filed on June 23, 1959, and was granted on October 12, 1959. (R. 92.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sheriff's sale of real property in execution of a judgment confessed by a mortgagee in a state court

extinguishes a junior federal tax lien on the property, where the United States had not been joined as a party to the proceeding pursuant to federal statute.

STATUTES INVOLVED

Sections 6321, 6322, 6323(a), 6325 (a), (b) and (c), 7403 and 7424 of the Internal Revenue Code of 1954, 28 U.S.C. 2410, and pertinent portions of the Pennsylvania statutes are set forth in the Appendix, *infra*, pp. 28–36.

STATEMENT

The facts, which are undisputed and are fully detailed in the opinions of the District Court (R. 23–31) and the Court of Appeals (R. 84–89), may be summarized as follows:

The taxpayers are George H. and Gladys M. Parkman and the Mountain Engineering Company, a corporation controlled by the Parkmans. On January 28, 1948, the Parkmans purchased from J. D. and Martha M. Berg 175 acres in Pennsylvania. In making this purchase the Parkmans executed a purchase money mortgage for $45,000, and a mortgage bond for $90,000. The property was conveyed back and forth between the Parkmans and the Mountain Engineering Company a number of times, the conveyances all being subject to the purchase money mortgage. (R. 84–85).

At a time when the corporation owned the property, federal withholding, unemployment and social security taxes totalling $40,403.34 were assessed against the corporation and became liens upon the property. Subsequently, an additional tax lien, arising from an

income tax deficiency of $9,767.68 assessed against the Parkmans at a time when they owned the property, attached to the property. The tax liens, all of which were recorded, were all junior to the mortgage. (R. 24, 81, 85.)

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955, caused a confession of judgment to be entered on the bond in the amount of $43,135, plus interest from June 1, 1955. A writ of *fieri facias* for the sale of the property was issued to the sheriff, but the sale was postponed while the surviving mortgagee petitioned for, and received from the Pennsylvania Court of Common Pleas, a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings under 28 U.S.C. 2410. No answer was filed and an order issued purporting to join the United States as a party to the proceedings. During the intervening time William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest. (R. 24, 85.)

The property was sold by the sheriff on January 3, 1956, and was bid in by Brosnan and Jacob for $6,203. This amount covered only the cost of the sale and outstanding local taxes. (R. 23, 85.)

On January 3, 1957, the Government attempted to redeem the property under 28 U.S.C. 2410(c) by tendering to Brosnan a check for $6,575.42 representing the amount bid at the sheriff's sale, plus interest. This tender was refused as totally inadequate in amount. (R. 24, 85.)

The United States brought the present action in the

federal district court on July 12, 1957, seeking alternative relief. First, under Section 7403 of the Internal Revenue Code of 1954, the Government sought to foreclose its liens by asking the District Court to determine the relative priorities of liens and to order a sale of the property and distribution of the proceeds in accordance with the determined priorities. Alternatively, in the event the District Court found that the Government had been joined as a party to the confessed judgment and execution sale, the Government sought a decree that it had properly executed its right of redemption. (R. 4–10, 23, 86.)

The District Court refused to grant either form of requested relief and dismissed the Government's complaint. It held that the United States was not made a party to the foreclosure proceedings within 28 U.S.C. 2410, since judgment was already entered when the rule to show cause issued. However, it concluded that the tax liens were nevertheless extinguished by the sale of the property on execution. Finally, it held that even if the Government had a right to redeem the property under 28 U.S.C. 2410(c), the amount offered was insufficient. (R. 27–31.) The court acknowledged (R. 30) that under Pennsylvania law "a mortgage is a lien only and not an estate"; that, as to all persons other than the mortgagee, "the mortgagor is regarded as the owner and title is in him"; and that "'[t]he Government lien in the instant case thus fastened upon a title to real property."

The Government's appeal was limited to the issue of whether its federal tax lien could be extinguished by the confession of judgment foreclosure and sale

when it had not been properly joined as a party. The Court of Appeals affirmed (R. 84–89). It held that joinder of the Government in such a proceeding is necessary only where local law requires it (R. 88); that Pennsylvania law "requires no more notice to junior lienors than is afforded by publication before subjecting their liens to extinguishment by sale of the property under the writ of *fieri facias* which was issued in this matter" (*ibid.*); that under Pennsylvania law an execution "on a judgment for a mortgage debt * * * relates back to the time of giving the mortgage" (R. 89); and that "[t]he United States consequently retains no interest in the property" (*ibid.*).

SUMMARY OF ARGUMENT

The court below held that foreclosure of a real estate mortgage lien pursuant to procedures authorized by Pennsylvania law extinguished a federal tax lien on the property, even though the United States was not made a party to the state proceedings. The rationale of the decision appears to be that because state law provides for extinguishment of the junior non-Government liens through such a procedure, junior federal tax liens are similarly extinguished. We submit, however, that the comprehensive and detailed scheme adopted by Congress for the discharge of federal tax liens constitutes the exclusive method by which Congress intended such liens to be extinguished; and that state proceedings, to which the United States is not a party, therefore cannot wipe out federal liens.

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There is no issue here with respect to priorities. The federal tax liens are admittedly junior to the mortgage lien, and the Government is seeking only the right to apply any excess remaining after the prior lien has been fully satisfied, toward the satisfaction of its admittedly valid second liens. The mortgagees cannot claim unfairness as long as their prior claim is fully satisfied.

A. The Internal Revenue Code contains specific and detailed provisions governing creation and discharge of federal tax liens. Section 6322 of the Internal Revenue Code of 1954 provides that, unless another date is specifically fixed by law, the tax lien "shall continue" until the tax assessment has been satisfied or becomes unenforceable by reason of lapse of time. Three different procedures for discharging the liens are provided by the Code. (1) The Secretary of the Treasury or his delegate may release a lien when the liability is satisfied or has become legally unenforceable, or a proper bond is furnished (Section 6325). (2) The United States may institute in a federal district court an action to enforce its lien, in which all persons having liens upon or claiming an interest in the property are made parties and in which the court may "finally determine the merits of all claims to and liens upon the property" (Section 7403). (3) Any person having a prior recorded lien upon or interest in property subject to a tax lien may, if the Secretary of the Treasury rejects his request that the Government institute a suit pursuant to Section 7403, *supra*, himself institute an action in the district court "for a final

determination of all claims to or liens upon the property in question" (Section 7424).

In addition to the foregoing provisions of the Internal Revenue Code governing the extinguishment of federal tax liens, an alternative procedure for their discharge is provided in the general federal lien statute (28 U.S.C. 2410). That act permits the United States to be named as a party "in any civil action or suit" in any federal district court, or in any state court having jurisdiction of the subject matter, "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." The United States may remove any state court action to the federal district court. A "judicial sale" in an action under this section has the same effect in discharging the property from the federal liens as local law provides; however, where real estate is sold to satisfy a lien prior to that of the United States, the latter has one year within which to redeem.

B. The foregoing detailed procedures governing the discharge of federal tax liens constitute, we believe, the exclusive method by which Congress intended such liens to be extinguished. Their legislative history indicates that Congress recognized that without such provisions there was no way other than payment by which the federal liens could be discharged. In consenting to suit against the United States in 28 U.S.C. 2410, Congress conditioned such consent upon various requirements designed "amply and fully [to] protect * * * the rights of the Federal Government" (H. Rep. No. 95, 71st Cong., 2d Sess., p. 2). To per-

mit federal liens to be discharged in state proceedings to which the United States is not a party would deny federal property the protection which Congress thus sought to give it.

In the instant case, the mortgagor's interest constituted "property or rights to property" of the taxpayer, within the meaning of Section 6321 of the Code, to which the federal tax lien attached. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy" this requirement, "state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States" (*United States* v. *Bess,* 357 U.S. 51, 56–57). By the same reasoning, "state law may not destroy a tax lien which has attached" (*Commissioner* v. *Stern,* 357 U.S. 39, 47) to a taxpayer's property interest. For it is Congress which created and defined the federal tax liens, and it is Congress which determines how they are to be removed. Since Congress has intended the detailed discharge provisions to be the exclusive method for their extinguishment, it is immaterial that under Pennsylvania law a junior lien is discharged through foreclosure of a prior mortgage at a sheriff's sale, without giving the junior lienor notice or making him a party.

To permit state law and policy to govern the discharge of federal liens would create "a serious danger of conflict with the administration of the federal [lien-discharge] program" (*Pennsylvania* v. *Nelson,* 350 U.S. 497, 505). For example, Congress, in accordance with the settled rule that the United States

is an indispensable party to any proceeding against property in which it has an interest, has required that the United States be made a party to any proceeding in which a federal lien may be discharged. State proceedings, however, frequently do not require the joinder of junior lienors. Similarly, although 28 U.S.C. 2410 gives the United States one year after foreclosure through judicial sale within which to redeem, the state provisions governing redemption sometimes give no right of redemption, and sometimes more or less than one year. Moreover, to permit the various state rules to govern the discharge of federally-created tax liens would be at odds with the "cardinal principle of Congress in its tax scheme" to achieve "uniformity, as far as may be" (*United States* v. *Gilbert Associates,* 345 U.S. 361, 364).

ARGUMENT

A FEDERAL TAX LIEN CAN BE EXTINGUISHED ONLY IN ACCORDANCE WITH THE SPECIFIC DISCHARGE PROVISIONS PROVIDED BY CONGRESS, AND NOT THROUGH STATE FORECLOSURE PROCEEDINGS TO WHICH THE UNITED STATES IS NOT A PARTY

The court below held that foreclosure of a real-estate mortgage lien pursuant to procedures authorized by Pennsylvania law extinguished a federal tax lien on the property, even though the United States was not made a party to the state proceedings. The rationale of the decision appears to be that because under Pennsylvania law foreclosure of a mortgage through a sheriff's sale operates to extinguish junior

private liens, it similarly extinguishes junior federal tax liens.

We shall show, however, that Congress has adopted a comprehensive and detailed scheme for the creation and extinguishment of federal tax liens; and that the states, therefore, cannot extinguish the federal liens unless they comply with the procedures provided therefor by Congress. We believe that this conclusion follows from the basic federal statutory scheme, its legislative history, pertinent decisions of this Court defining the relationship between federal and state law in the tax-lien field, and the adverse effect upon, and conflict with, the Congressional scheme of federal tax liens that would result if each state could apply its own local foreclosure procedures to terminate the federal liens. Since the applicable federal procedures were found not to have been complied with here,[1] it follows that the state foreclosure proceedings did not operate to extinguish the federal liens.

There is no issue in this case with respect to priorities, since the federal tax liens are admittedly junior to the mortagage lien. Nor can there be any valid contention that recognizing the continued validity of the federal liens after the state foreclosure proceedings would be unfair to other property interests. For the sole question is whether, after the prior lien has been fully satisfied, the United States is entitled to utilize any excess toward the satisfaction of its admittedly valid second liens; or whether the state-court foreclosure procedures can be utilized to wipe out the federal security interests, with a consequent windfall

[1] This ruling was correct. See *infra*, n. 4, p. 15.

to subordinate interests which would otherwise have no claim against the property until the federal lien had been fully satisfied.

A. THE STATUTORY SCHEME FOR THE CREATION AND EXTINGUISHMENT OF FEDERAL TAX LIENS

Congress has provided a comprehensive policy governing federal tax liens. The Internal Revenue Code for many years has contained specific and detailed provisions dealing with both their creation and their discharge.

1. Section 6321 of the 1954 Code (Appendix, *infra*, p. 28) provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." The foregoing lien, however, is not valid against any "mortgagee, pledgee, purchaser, or judgment creditor" until notice thereof has been filed by the District Director of Internal Revenue as therein provided (Section 6323, Appendix, *infra*, p. 28).

Section 6322 provides that, unless another date is specifically fixed by law, "the lien * * * shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time" (Appendix, *infra*, p. 28).

2. Three different procedures for discharge of federal tax liens are provided by the 1954 Code:

(a) Section 6325 (Appendix, *infra*, pp. 29–30) provides that the Secretary of the Treasury or his delegate may release a lien when (1) the liability is satisfied or has become legally unenforceable, or (2) a bond

is furnished conditioned on payment of the amount assessed. The section also provides for a partial discharge of the property subject to the lien, in situations where such discharge will not jeopardize the Government's security interest.

(b) Section 7403 (Appendix *infra*, pp. 30–31) authorizes the Attorney General, at the request of the Secretary of the Treasury or his delegate, to institute in a federal district court an action "to enforce the lien of the United States" upon "any property, of whatever nature" of a delinquent taxpayer, or upon property "in which he has any right, title, or interest." All persons having liens upon the property or claiming an interest therein are required to be made parties. The court is authorized to adjudicate all matters involved and to "finally determine the merits of all claims to and liens upon the property," and where a claim or interest of the United States is established, the court may decree a sale of the property and distribute the proceeds according to the interests of the United States and other parties. The instant proceeding was instituted by the United States under the provisions of this section.

(c) Section 7424 (Appendix, *infra*, pp. 31–32) provides that any person having a prior recorded lien upon or interest in property subject to a tax lien, or any person purchasing such property at a sale held to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section 7403. If such action is not authorized within six months, such person may, after notice to the Secretary, petition the United States District Court for leave to file a civil

action "for a final determination of all claims to or liens upon the property in question."[2] The district court may grant leave to file such civil action "in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties." Upon the filing of such civil action, the district court "shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403."

3. In addition to the foregoing provisions of the Internal Revenue Code governing the extinguishment of federal tax liens, an alternative procedure for their discharge is provided in the general federal lien statute. Under 28 U.S.C. 2410 (Appendix, *infra*, pp. 32–34), the United States may be named as a party "in any civil action or suit" in any federal district court, or in any state court having jurisdiction of the subject matter, "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." Under this procedure, the complaint must set forth with particularity the interest or lien of the United States, service in state-court cases must be made upon the Attorney General and the United States Attorney, the United States is given 60 days within which to reply, and the United States may remove any state-court action to the federal district court. "A judicial sale" in an action under the section "shall have the same effect" in discharging the

[2] We have been advised that the Internal Revenue Service interprets this provision as authorizing the private party to institute suit immediately upon the Government's refusal to bring suit, without waiting for six months.

property from the federal liens "as may be provided with respect to such matters by the local law of the place where the property is situated." However, when real estate is sold to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem."[3]

B. THE FEDERAL STATUTORY PROVISIONS FOR THE DISCHARGE OF TAX LIENS PRESCRIBE THE EXCLUSIVE METHOD BY WHICH SUCH LIENS MAY BE EXTINGUISHED.

The foregoing detailed procedures governing the discharge of federal tax liens constitute, we believe, the exclusive method by which Congress intended such liens to be extinguished. For "[t]he scheme of federal regulations * * * [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230), let alone to interfere with it. Here Congress has provided three different procedures for tax-lien discharge under the Internal Revenue Code, as well as an alternative procedure under the general-lien statute. In the circumstances, we submit that there is no room for any attempt by the states to discharge such liens other than in conformity with the federal procedures.[4]

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[3] Section 2410 further provides that a sale to satisfy a lien inferior to that of the United States is made subject to that lien, unless the United States consents to the property being sold free of its liens and the proceeds being divided as the parties are entitled; that whenever the debt owing the United States is due, it may request foreclosure of its own lien; and that where property is sold to satisfy a first lien of the United States, the latter may bid at the sale.

[4] Although the surviving mortgagee attempted, under 28 U.S.C. 2410, to make the United States a party to the fore-

1. This view is supported by the legislative history of the various federal lien-discharge provisions. The provision which is now contained in Section 7424 of the 1954 Code—which authorizes the holder of a prior lien to institute a proceeding in the district court "for a final determination of all claims to or liens upon the property in question"—first appeared in the Revenue Act of 1924, 43 Stat. 253. This "new provision" was, as the Senate Committee stated (S. Rep. No. 398, 68th Cong., 1st Sess., p. 46), "designed to afford to the holder of a lien prior in time to that of the United States for taxes a method of procedure for clearing the title to the property." The committee pointed out (*ibid.*) that such a provision was necessary because:

> At the present time, in cases in which the lien prior in time to that of the United States equals or exceeds in amount the value of the property, there is no method whereby the lien for taxes

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closure proceedings, the district court held (R. 27) that "Section 2410 was not validly invoked by the mortgagee * * *." That ruling was correct. The obvious purpose of the notice requirements of Section 2410 is to give the United States an opportunity to participate in the state proceedings before any action is taken which may affect its security interests. The district court therefore correctly ruled (R. 26, emphasis added) that "to properly invoke Section 2410, the United States must be named *initially* as a defendant in the state court civil action." In the instant case, however, this requirement was not met, since "the judgment of confession on the mortgage bond had already been entered" (on June 7, 1955) when the surviving mortgagee sought to make the United States a party (on September 22, 1955). Thus, "[t]he most that can be said about the proceedings in the instant case is that an attempt was made to make the United States a party to the execution of a judgment already entered * * *" (R. 26–27).

> may be discharged without payment. Although the lien may thus be valueless to the United States, it remains a cloud on the title which the prior lienor is powerless to remove. The subdivision gives the lienor a remedy in this case.

In other words, Congress recognized when this provision was first enacted that without it there was "no method whereby the [federal] lien for taxes may be discharged without payment." And Congress specifically included the provision in order to give the senior lien holder "a method of procedure for clearing the title to the property." Thus, at that time Congress plainly was of the view that, unless some specific provision were made for discharge of federal liens, they could be removed only by payment of the Government's claim. And while the committee report does not specifically consider whether such liens could be eliminated through state-court proceedings, we believe that the necessary implication of the committee's statement is that they could not.[*] For otherwise the committee would not have stated that without the amendment there would be "no method" whereby the federal lien might be discharged without payment.

The legislative history of the general federal-lien statute (now contained in 28 U.S.C. 2410) similarly shows that it was enacted on the premise that there was no other existing method for removing liens for debts due the United States. In favorably reporting the bill that became the predecessor statute,

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[*] Further indication is found in the provision of Section 7424 which permits suit thereunder not only by the holder of a prior recorded lien but also by "any person purchasing the property at a sale to satisfy such prior lien or interest."

the House Committee stated (H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1–2) that the legislation had been recommended by various real estate interests for a number of years

> * * * in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment.
>
> The purpose of this bill is to provide a simple and just method of proceeding in such cases, one which is fair to the holder of the prior lien on the real estate and which amply and fully protects the rights of the Federal Government. * * *
>
> * * * * *
>
> * * * The law provides and equity dictates that the Government's lien in such circumstances

> should have a junior status, yet under the present practice the inability of the plaintiff to bring the United States in as a party to the proceeding to foreclose or have execution and sale on a court judgment where a Government lien is found to have been placed upon the property subsequently to the time of the plaintiff's encumbrance ties the hands of a prior lien holder by making it impossible for him to grant a clear title to the property and thus for no just reason deprives him of the benefits of his security or court judgment as the case may be.

See, also, S. Rep. No. 351, 71st Cong., 2d Sess., p. 2.

During the House debates on the measure, a question arose as to the effect of state foreclosure proceedings upon a junior federal lien. Congressman Burtness stated his understanding that a provision of the bill for release of worthless federal liens by administrative action

> would apply to a case of this sort: In many States foreclosure by advertisement is permitted, with the right of redemption. Assume that a prior lien is foreclosed, the Government has a junior lien, the time for redemption expires and the purchaser at the foreclosure sale of the prior lien gets title through the foreclosure proceedings under State laws. Presumably in a case of that sort the enforcibility of the Federal lien as a practical proposition has been wiped out, but it is still a cloud on the title. Now, in that sort of a case, could the administrative officers give relief under the amendment that is proposed without going into court in any way?

> Mr. HAWLEY. If at any time they find as a matter of fact that the Government lien is valueless they are authorized to release that lien by the pending amendment.
>
> Mr. BURTNESS. And it may become valueless for several reasons, for instance, depreciation in the value of the property, the amount of prior liens foreclosed in legal proceedings, or anything else.

At this point Congressman Graham, chairman of the House Judiciary Committee which had reported the bill, flatly stated:

> The foreclosure the gentleman speaks of could not possibly discharge the Government's lien.
>
> Mr. BURTNESS. I understand it would not be discharged * * *. [72 Cong. Rec. 3121–3122]

In granting consent to suit against the United States in order to permit removal of junior federal liens, Congress thus recognized that without that consent such liens could not be discharged, i.e., they could not be discharged merely by following local foreclosure proceedings. Furthermore, Congress imposed numerous conditions upon the right to make the United States a party (see *supra,* pp 13–14), in order "amply and fully [to] protect * * * the rights of the Federal Government." The decision below, by wiping out "the [security] rights of the Federal Government" through a state foreclosure proceeding in which the United States was not given the protection that Congress intended (see *infra,* pp. 24–25) thwarts that Congressional intent.

2. In the instant case, the district court found (R. 30) that under Pennsylvania law the mortgagor

retains the "title to real property."[5] Accordingly, the mortgagor's interest constituted "property or rights to property" of the taxpayer within the meaning of Section 6321 of the 1954 Internal Revenue Code (see *supra*, p. 11), to which the federal tax lien attached. While this federal lien was admittedly junior to the mortgage, it was nonetheless a valid lien. Upon the statisfaction and discharge of the mortgage debt, the federal lien would have first priority.

Although state law "determine[s] what property rights and interests a taxpayer actually has * * * their consequence for purposes of federal taxation is a matter of federal law" (Mr. Justice Black, dissenting, in *Commissioner* v. *Stern*, 357 U.S. 39, 48, footnote, and cases there cited). For "[t]he effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question" (*United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 49). Thus, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of Section 3670 [Section 6321 of the 1954 Code], state law is inoperative to prevent the attachment of liens created

[5] The finding was clearly correct. In Pennsylvania, a mortgage creates only a security interest in favor of the mortgagee; the mortgagor remains the owner of the land. *Harper* v. *Consolidated Rubber Co.*, 284 Pa. 444, 451, 131 Atl. 356, 358; *Shields* v. *Pittsburgh*, 252 Pa. 74, 76, 97 Atl. 124, 125; see *Brunn* v. *Wichser*, 75 F. 2d 25, 27–28 (C.A. 3).

by federal statutes in favor of the United States" (*United States* v. *Bess*, 357 U.S. 51, 56–57).*

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*This Court has repeatedly held, in various contexts, that state law cannot defeat or modify federal tax liens. See, for example, *Field* v. *United States*, 9 Pet. 182, holding that the priority granted the United States in the payment of its debts cannot be defeated by state insolvency laws; *United States* v. *Snyder*, 149 U.S. 210, holding that the tax lien of the United States, is not subject to state recording laws; *Burk-Waggoner Ass'n* v. *Hopkins*, 269 U.S. 110, holding that, although a partnership under state law, the taxpayer nevertheless was an association taxable as a corporation for federal income tax purposes; *Florida* v. *Mellon*, 273 U.S. 12, holding that a state law cannot affect the right of the United States to levy and collect the federal estate tax; *Morgan* v. *Commissioner*, 309 U.S. 78 (and cases cited in fn. 5, p. 81), holding that the power of appointment there involved was a "general power of appointment" for purposes of the federal estate tax law regardless of its characterization—whether "general" or "specific"—under state law; *United States* v. *Summerlin*, 310 U.S. 414, holding that the United States is not bound by provisions of state law limiting the period of filing claims against the estate of a decedent; and *United States* v. *Thompson*, 98 U.S. 486, holding that the United States is not otherwise bound by a state statute of limitations. See also *Burnet* v. *Harmel*, 287 U.S. 103, 110.

In support of the proposition that state law may not interfere with the priority of federal tax liens that have once attached to property, see *United States* v. *Security Tr. & Sav. Bk.*, *supra*, pp. 49–50; *United States* v. *New Britain*, 347 U.S. 81, 84; *United States* v. *Acri*, 348 U.S. 211, 213; *United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215; *United States* v. *Scovil*, 348 U.S. 218, 220; *United States* v. *Colotta*, 350 U.S. 808; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010; *United States* v. *Vorreiter*, 355 U.S. 15; *United States* v. *Ball Construction Co.*, 355 U.S. 587, rehearing denied, 356 U.S. 934; *United States* v. *Hulley*, 358 U.S. 66.

The supremacy of federal over state law has also been given

We believe that similar reasoning compels the conclusion that "state law may not destroy a tax lien which has attached" (*Commissioner* v. *Stern, supra,* p. 47) to a taxpayer's property interests. For it is Congress which created and defined the federal tax liens, and it is Congress which determines how they are to be removed. As we have shown (*supra,* pp. 11–14), detailed and comprehensive procedures for such removal have been "created by federal statutes" (*Bess, supra*), in circumstances which indicate that Congress intended them to be the exclusive method for discharge. It is, therefore, immaterial that under Pennsylvania law a junior lien is discharged through foreclosure of a prior mortgage at a sheriff's sale, without giving the junior lienor notice or making him a party.

The fact, relied upon by the court of appeals (R. 89), that under Pennsylvania law an execution "on a judgment for a mortgage debt * * * relates back to the time of giving the mortgage," affords no basis for eliminating the federal liens.[7] For it is well settled

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effect in cases arising under Section 3466 of the Revised Statutes. *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Texas*, 314 U.S. 480; *Illinois* v. *Campbell*, 329 U.S. 362, 371; *United States* v. *Waddill Co.*, 323 U.S. 353, 356–357; *United States* v. *Gilbert Associates*, 345 U.S. 361, 362.

[7] The statement of the court below (R. 88) that "it is clear that notice of this foreclosure was given to the United States" affords no basis for its decision. While such notice may satisfy the requirements of state law for extinguishing junior private liens, it is not a substitute for the procedures drawn by Congress for extinguishing federal liens. The rationale of the decision below is not that the Government had actual notice of the foreclosure, but that a federal lien may be extinguished

that "the doctrine of relation back * * * [cannot] operate to destroy * * *" an existing federal tax lien. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50; *New York* v. *Maclay*, 288 U.S. 290, 294. Here the district court found (R. 30) that, as between the taxpayers and the United States, the Government had a "lien * * * upon a title to real property."

Indeed, the court below previously had recognized that a federal tax lien that "has been established against property of a taxpayer" is "immune to state action," and "may only be removed as federal laws permit." *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9, 12 (C.A. 3). Similarly, in *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311 (C.A. 6), certiorari denied, 310 U.S. 630, the Sixth Circuit, in holding that state foreclosure proceedings instituted by the first mortgagee, to which the United States was not a party, did not wipe out the federal junior tax lien, ruled (p. 313):

> * * * The Federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal and when such liens once attach, they may be lifted only as provided thereunder.

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pursuant to state foreclosure proceedings. If, under state law, a junior lien could be eliminated in foreclosure proceedings without actual notice to its holder, the theory of the court below would permit discharge of a federal lien by the same procedure. As we have shown, the basic error of the court of appeals is its failure to recognize that federal liens may be discharged only by following the procedures prescribed by Congress, and not through the procedures which the states have developed for discharging private liens.

The Ninth Circuit reached the same conclusion in the companion case here, *United States* v. *Bank of America National Trust & Savings Association*, 265 F. 2d 862, pending on writ of certiorari, No. 183, this Term. See, also, *Miners Sav. Bank of Pittston, Pa.* v. *United States*, 110 F. Supp. 563, 570 (M.D. Pa.)

3. To permit state law and policy to govern the discharge of federal liens "may produce a result inconsistent with the objective of the federal statute" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230), and would create "a serious danger of conflict with the administration of the federal program" (*Pennsylvania* v. *Nelson*, 350 U.S. 497, 505). There are numerous areas of conflict, both actual and potential, between federal and state policies in this area. We indicate some of the more serious:

(a) Under the federal legislation, the United States must be made a party to any proceeding in which a federal lien may be discharged, with all the rights and protections that a party has.[8] Under many state statutes, however (including Pennsylvania),[9] a junior lienor is not an indispensable party to proceedings to eliminate his lien. If it is not a party, the United

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[8] This requirement reflects the settled rule that a "proceeding against property in which the United States has an interest is a suit against the United States," to which the latter is an indispensable party. *United States* v. *Alabama*, 313 U.S. 274, 282; *The Siren*, 7 Wall. 152; *Minnesota* v. *United States*, 305 U.S. 382, 386. A federal tax lien gives the United States an interest in the property to which the lien attaches. *United States* v. *City of Greenville*, 118 F. 2d 963, 966 (C.A. 4); see *In re Pennsylvania Central Brewing Co.*, 135 F. 2d 60, 63 (C.A. 3).

[9] *United States* v. *Cless*, 254 F. 2d 590, 592–593 (C.A. 3).

States is denied the right to raise a number of issues which may vitally affect its interests, including questions as to the validity of the prior mortgage and whether any part of the amount due thereon is junior to the federal lien (cf. *United States* v. *Ball Construction Co.*, 355 U.S. 587).

(b) In a state court proceeding under 28 U.S.C. 2410, the United States can remove to the federal court. There is no right of removal under local foreclosure statutes.

(c) 28 U.S.C. 2410 gives the United States the right to redeem within one year after foreclosure through judicial sale. However, the redemption provisions under state foreclosure laws vary from state to state. In some, junior lienors have no right of redemption; in others, the redemption period is more or less than a year. See Jones, *Mortgages* (8th Ed.), Vol. 2, §§ 1334, 1363; Vol. 3, §§ 1690–1746, 1994, 1996. To apply these differing state redemption provisions to federal liens would frequently produce a direct conflict with the specific federal redemption provision.[10]

Indeed, Pennsylvania law itself treats state tax liens more favorably than federal tax liens. A Pennsylvania statute provides that "The lien of all taxes * * * against any real estate within this Com-

[10] Such a conflict is involved in *United States* v. *John Hancock Mutual Life Insurance Co.*, pending on jurisdictional statement, No. 565, this Term. There the Supreme Court of Kansas held that the United States, as second mortgagee, could not exercise its right under 28 U.S.C. 2410 to redeem within one year property sold at a state foreclosure sale, because Kansas law gives the mortgagor the exclusive right to redeem during that period.

monwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes" (Purdon's Penna. Statutes Annotated, Title 53, Section 7104, Appendix, *infra*, p. 36). While Pennsylvania law permits discharge of a junior lien on realty through foreclosure of a prior mortgage at a sheriff's sale, the Commonwealth's liens may be divested only to the extent permitted by statute. *Liss* v. *Medary Homes*, 388 Pa. 139, 130 A. 2d 137; *Commonwealth* v. *Udziewicz*, 353 Pa. 543, 46 A. 2d 231; *Baird* v. *Moshannon C. M. Co.*, 318 Pa. 63, 178 Atl. 19; *Silverman* v. *Keal*, 135 Pa. Super. 568, 7 A. 2d 57. Thus, under Pennsylvania law the state's tax lien will be discharged through foreclosure only if the state's tax claim is paid in full out of the proceedings. The decision below holds, however, that the same foreclosure proceeding wipes out the federal lien even though the United States receives not a single penny toward payment of its claim.

Finally, we point out that to permit the various and divergent state rules to govern the discharge of federally-created tax liens would be at odds with the "cardinal principle of Congress in its tax scheme" to achieve "uniformity, as far as may be" (*United States* v. *Gilbert Associates*, 345 U.S. 361, 364). Uniformity in this important area of federal tax law can be achieved only by holding, in accordance with what we believe to be the clear intent of Congress, that the federal procedures provide the exclusive method for discharging federal tax liens.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the cause remanded to the district court to grant the relief requested in Paragraph XX (3, 4 and 5) of the complaint.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.[1]

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. Sec. 6321)

SEC. 6322. PERIOD OF LIEN.[1]

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. Sec. 6322)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.* Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice

[1] Internal Revenue Code of 1939, Sections 3670 and 3671 (26 U.S.C. 1952 ed., Secs. 3670 and 3671) under which some of the liens herein arise contain substantially the same provisions.

thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. Sec. 6323)

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.* Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) *Liability satisfied or unenforceable.* The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

(2) *Bond accepted.* There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

(b) *Partial Discharge of Property.*—

(1) *Property double the amount of the liability.* Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured

by such lien and the amount of all other liens upon such property which have priority to such lien.

(2) *Part payment or interest of United States valueless.* Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

(A) there is paid over to the Secretary or his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

(c) *Effect of Certificate of Release or Partial Discharge.* A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 6325)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secre-

tary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.* All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.* The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States.

(d) *Receivership.* In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(2n U.S.C. Sec. 7403)

SEC. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) *Obtaining Leave to File.—*

(1) *Request for institution of proceedings by United States.* Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the prop-

erty is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) *Petition to court.* If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser, may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) *Court order.* After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) *Adjudication.* Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) *Costs.* All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.
(26 U.S.C. Sec. 7424)

28 U.S.C.:

SEC. 2410 [As amended by the Act of May 24, 1949, c. 139, 63 Stat. 89, Sec. 119] *Actions affecting property on which United States has lien.*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United

States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

Purdon's Penna. Statutes Annotated (Perm. Ed.), Title 12:

SEC. 2441. WHEN VENDITIONI EXPONAS MAY ISSUE.

If the inquest shall find that the clear profits, of any real estate levied as aforesaid, will not be sufficient to satisfy, within seven years, the debtor or damages in such execution, and the same shall be approved of by the court, the

plaintiff in such writ may have a writ of venditioni exponas, to sell such real estate, for and towards the satisfaction of his judgment. 1836, June 16, P.L. 755, Sec. 61.

SEC. 2442. TIME FOR SALE.

All sales of real estate by sheriffs and coroners shall be made on or before the return day of the writs respectively, or within six days thereafter. 1845, April 16, P.L. 538, Sec. 2.

Sec. 2443. NOTICE TO BE GIVEN BY HANDBILLS.

But before any sale of real estate shall be made as aforesaid, the officer shall cause so many written or printed handbills to be made, upon parchment or good paper, as the debtor or defendant shall reasonably request, or so many without such request as may be sufficient to give notice of such sale, and of the day and hour when, and the place where the same will be, and what lands or tenements are to be sold, and the place where they lie, which notice shall be given to the defendant, and one of the said papers or parchments shall be fixed by the sheriff, or other officer, upon the premises, and the others of them in the most public places of the county or city, at least ten days before such sale. 1836, June 16, P.L. 755, Sec. 62.

SEC. 2444. ADVERTISEMENT OF SALE; PENALTY FOR NEGLECT.

The officers shall also give notice of every such sale by advertisement describing the real estate to be sold, and the time and place of sale, as aforesaid, in at least two newspapers of general circulation, one of which except in the city and county of Philadelphia, may, and in counties having a population of one hundred and fifty thousand and upwards shall, be a German paper. If, however, there be no newspaper published in such county, then in the newspaper printed nearest thereto, once a week during three successive weeks previous to such sale,

under penalty of fifty dollars to any party aggrieved by such neglect, to be recovered as debts of like amount are recovered: Provided, That nothing herein shall debar any party aggrieved from recovering the damages which he may actually sustain by reason of such neglect. 1836, June 16, P.L. 755, Sec. 63; 1895, July 2, P.L. 420, Sec. 1.

Purdon's Penna. Statutes Annotated (Perm. Ed.), Tital 21:

SEC. 804. SALE OF REAL ESTATE UPON WRIT OF FIERI FACIAS.

No inquisition shall be necessary in connection with the sale of real estate by the sheriff, upon a writ of fieri facias, issued upon a judgment entered upon a bond or promissory note accompanying a mortgage, secured upon the real estate to be sold; and the sheriff may, after giving notice in the manner now provided by law in cases of sales under writs of venditioni exponas, proceed to sell such real estate upon the said writ of fieri facias without any other writ whatever. 1929, May 6, P.L. 1557, Sec. 1; 1951, Sept. 26, P.L. 1450, No. 352, Sec. 1.

Purdon's Penna. Statutes Annotated (Perm. Ed.), Title 53:

SEC. 7104. TAX LIEN DIVESTED BY JUDICIAL SALE.

The lien of all taxes now or hereafter to be levied or assessed against any real estate within this Commonwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes. 1895, May 22, P.L. 111, No. 84, Sec. 1.

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No. 137

IN THE

Supreme Court of the United States

October Term, 1959

UNITED STATES OF AMERICA,
Petitioner

vs.

WILLIAM J. BROSNAN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether a sheriff's sale of real property in execution of a judgment confessed by the first mortgagee in a state court divests a junior federal tax lien on the property, where the United States was not originally named as a defendant in the confession of judgment proceedings, but was subsequently joined by the state court as a party defendant before the execution sale?

STATUTES INVOLVED

Sections 6321, 6322, 6323(a), 6325(a), (b) and (c), 7403 and 7424 of the Internal Revenue Code of 1954, 28 U.S.C. 2410, and pertinent portions of the Pennsylvania statutes are set forth in the Appendix to appellant's brief, pp. 28-36.

STATEMENT OF HISTORY

The taxpayers involved in this dispute are George H. Parkman, Gladys M. Parkman, his wife and the Mountain Engineering Company, a corporation which they control.

On January 8, 1948 Parkmans purchased a tract of land containing 175 acres in Allegheny County, Pennsylvania from J. D. and Martha M. Berg giving to the Bergs a purchase money mortgage for $45,000.00 with bond of $90,000.00. This real estate was conveyed back and forth from the Parkmans to their corporation on several occasions, always subject to the mortgage. Subsequent to this conveyance from the Bergs to the Parkmans several federal liens were filed against the Parkmans and their corporation which became liens against this land.

On June 7, 1955, following default, the surviving mortgagee confessed judgment on the bond stating a real debt of $43,135.00 with interest from June 1, 1955. A writ of execution was issued out of the Court of Common Pleas of Allegheny County to the Sheriff thereof, but the sale was postponed while said surviving mortgagee petitioned the said court for a rule on the United States to show cause why it should not be joined as an additional defendant at the execution. No answer was filed and 89 days after service of process on the United States, the state court ordered it joined as an additional defendant. During the aforesaid 89 day period William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest and are the defendants herein.

Statement of History

On January 3, 1956 at sheriff's sale the property was sold to Brosnan and Jacob for costs and taxes of $6,203.00 plus the discharge of the mortgage indebtedness.

On January 3, 1957, by tender of a check to Brosnan only for $6,575.42 the Government attempted to redeem the property under 28 U.S.C. 2410(c). No tender at all was made on Jacob and the tender to Brosnan was refused as being wholly inadequate.

On July 12, 1957 the Government commenced this action in the federal district court seeking alternative relief. First, it sought a foreclosure on its liens pursuant to Section 7403 of the Internal Revenue Code of 1954. Alternatively, it sought a decree that it had properly redeemed the property under 28 U.S.C. 2410(c).

The District Court refused both Government contentions. It held that the Government had not been properly joined as a party defendant in the state court execution, but concluded that the government's liens were divested when the property right on which they were founded was extinguished by the sheriff's sale. It also added that the attempted redemption failed because of inadequacy.

The Court of Appeals affirmed the District Court decision basing its decision on a like theory.

SUMMARY OF ARGUMENT

The court below held that foreclosure of a real estate first mortgage lien, prior in time to federal liens, pursuant to Pennsylvania laws, extinguished the property rights to which the federal liens had attached and as a result the federal liens were divested from said real estate even though the United States was not made a party to the execution under 28 U.S.C. 2410.

There is no dispute that the mortgage in question was both prior in time and prior in right to the federal liens. There is no dispute that the Government's tender for redemption was abortive and, in fact, the Government has admitted this fact and discontinued any argument thereon.

There remains only one basic issue to be decided and that is whether federal junior liens which become encumbrances against real estates by virtue of a property right held therein by a delinquent taxpayer can continue as encumbrances after the taxpayer loses his interest pursuant to the exercise of a right to which the federal lien is admittedly junior.

The lower court's holding that when the property rights of a delinquent taxpayer in real estate have been extinguished by state law procedures, and that thereafter the government has no right of its own in and to the real estate simply because of its having filed its liens of record, is a proper one and should be affirmed.

ARGUMENT

A Federal Tax Lien Which Attaches to a Property Right of a Taxpayer-Owner of Real Estate Is Divested Therefrom When Such Property Right Is Itself Extinguished According to State Law

The court below held that the foreclosure on the real estate mortgage lien pursuant to procedures of the Pennsylvania law extinguished the mortgagor-taxpayer's property right to which the federal lien had attached and consequently the lien itself was divested.

A. The Pennsylvania procedure by a mortgagee for execution on real estate against a delinquent mortgagor.

A review of the Pennsylvania foreclosure procedure laws Pa. Stat. Ann. tit. 21, sec. 804; tit. 12, secs. 2441-2444 disclose that the procedure in the subject case was proper. A writ of fieri facias was issued directing the Sheriff to advertise the sale, levy upon, and sell the premises at auction R. 20-22.

The Laws of Pennsylvania afford an execution-mortgagee a choice of remedies. He may confess judgment on the bond accompanying the mortgage, issue a writ of fieri facias and sell real estate without issuing any other writ Pa. Stat. Ann. tit. 21 sec. 804; or in the alternative, he may institute scire facias proceedings sur mortgage, obtain a

judgment and then sell on a writ of levari facias. In confessing judgment on the bond the mortgagee obtains a judgment "in personam"; whereas, in proceeding by scire facias he obtains a judgment "in rem". See *Cooper vs. Lucas*, 152 Pa. Superior Ct. 655, 33 A. 2d 466, 469. With a judgment "in personam" the mortgagee may proceed against any and all property owned by the mortgagor; whereas, in a proceeding "in rem" he is limited to the property described in the mortgage. In the case at bar it was the absolute legal right of the surviving mortgagee to confess judgment on the bond as was done. She was not limited to a scire facias action. See, *In re Coke's Estate*, 157 Pa. 457, 27 A. 773. The entry of a judgment by confession has the same force and effect as a suit and judgment on a verdict. We refer to the case of *O'Hara vs. Manley*, 140 Pa. Superior Ct. 39, 12 A. 2d 820 at page 822, where the court said:

> "'The confession of judgment is but one of the ways and processes—one "manner"—by which a person is sued. [Confession of a judgment] is a voluntary submission to the jurisdiction of the court, giving by consent and without the service of process, what could otherwise be obtained by summons and complaint, and other formal proceedings. A person who confesses a judgment submits to be sued in that form and manner.' First National Bank v. Garlinghouse, 53 Barb., N.Y., 615, 619."

The purchaser at a Pennsylvania sheriff's sale takes the same estate as was held prior to execution by the one for whose debt the property is sold. Pa. Stat. Ann. tit. 12, sec. 2447, Act of June 16, 1836, P.L. 755. When the execution is on a judgment for a mortgage debt, the judgment

relates back to the time of the mortgage. *West Arch Building & Loan Assn. v. Nichols*, 303 Pa. 434 (1931); *Moore v. Schell*, 99 Pa. Superior Ct. 81 (1930). The effect of the sheriff's sale in the instant case was to extinguish the prior property right or interest of the mortgagor-taxpayer in the subject tract of real estate.

B. Divestiture of a federal tax lien after the extinguishment of the property right upon which such lien was based.

In order to be effective a federal lien must attach or affix itself to a taxpayer's property right. The lien itself cannot operate in a vacuum, but depends on a res, the taxpayer's property right, for its sustenance. The government bases its appeal on the theory that once a federal tax lien attaches to real estate by means of a property right held therein by a taxpayer, then such lien may be divested from that real estate only by relief afforded in the several federal statutes it cites, regardless of the extinguishment of the taxpayer's property right therein under State law. No case is cited to support this novel proposition. The Government thus contends for a new legal concept. It would have the Court give a federal tax lien a quality unknown to any other lien,—the power to resurrect or create some previously non-existing property right to which the lien can attach. This is asking too much even in this "space age".

The correct theory, the one which serves as a solid foundation for the opinion of the court below, is that the existence of the taxpayer's property right is a matter for determination by state law, and, once it has been estab-

lished by state law that such property right no longer exists then, the very basis of the federal lien having been removed, it must logically follow that the lien itself is divested from that property to which the property right formerly attached. That state law should control in such a situation to determine the every existence of such a property right was settled by *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64 (1938). Mr. Justice Brandeis, in an opinion which has become a landmark, stated the following:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . ."

See *United States v. Bess*, 357 U.S. 51, 55 (1958), wherein it was determined that state law must be looked to in order to determine those rights and incidents arising from a federally created lien which are not prescribed by federal law.

In opposition to this theory, the Government relies upon the case of *Metropolitan Life Insurance Co. vs. United States*, 107 F. 2d 311 (6 Cir. 1939). On the surface the decision in that case would appear favorable to the

Government's contention, but under close examination a basic fallacy is evident in the opinion. For adverse comment thereon see 53 Harv. L. R. 894 and 49 Yale L. J. 1106. At pages 1108 and 1109 of the latter the fallacy is pinpointed. The majority failed to distinguish between release or discharge of a specific lien and adjudicating a specific lien to be non-existent. In a vigorous dissent in the *Metropolitan* case Circuit Judge Arant stated in part:

> "If any interest of the tax debtor survived the exercise of the power of sale the conclusion could be accepted. But the interest of the tax debtor to which the lien had attached was extinguished when the property was sold for less than the claim of the mortgagee. Let us suppose a tax debtor owned an estate in fee subject to a condition subsequent and after a tax lien attached, the condition occurred which terminated his estate. All his interest having been extinguished, is the tax lien thereafter existent and enforceable? Unless the Congress has power to take the property of one person to pay the tax debt of another this question must be answered in the negative."

In the case of *U. S. v. Boyd*, infra, a case of similar facts, the court, perceiving the problem herein presented stated that it is a consequence of the prior lien and the rights of enforcement granted by it which destroy the junior liens, federal or otherwise, come from its very nature of being superior and not from some later determination to the same effect.

In the case at bar the Government commenced its action, inter alia, under the provisions of Section 7403, Internal Revenue Code 1954 requesting a sale of property.

In accordance with that Section a sale may be decreed only "... where a claim or interest of the United States ... is established". Following the theory of the *Metropolitan* case dissent and of the *Boyd* case majority there remains no interest in the United States on its junior liens after the sale on execution following confession of judgment on a superior mortgage lien.

The Government argues that only by use of federal procedures adopted by Congress may federal liens be "extinguished". Throughout the trial, the appeal to the circuit court and in its present brief the Government has used the words "extinguished", "abolished" and "wiped out" to define several separate and distinct legal consequences. Removal of a lien by payment in full or by settlement, removal of it by release, and mere divestiture of it from one of several parcels of land of a taxpayer, have all been referred to as "extinguishment" of the lien. The liens in question might be said to be extinguished so far as they relate to the subject property, but to say that they are "extinguished", "abolished" and "wiped out" generally is untrue and misleading. Even today, the liens on which the Government based its lower court action are open on the records in the Prothonotary's Office of Allegheny County, Pa. where originally filed. They are still good and valid liens against other property owned or controlled by the taxpayers. By the decision of the court below it was held that these liens had simply been divested by the sheriff sale from this one particular tract of real estate, but certainly their legality in all other respects against the taxpayers remains unchanged.

C. Rights and remedies under Sections 2410 and 7403.

The Government has limited its appeal to its right of foreclosure under Section 7403 of the Internal Revenue Code of 1954. By this section the Attorney General is authorized to institute an action "to enforce the lien of the United States" upon "any property, of whatsoever nature" of a delinquent taxpayer, or upon property "in which he has any right, title or interest". Again, this action is directed against a "property right" the very existence of which must be determined by state law. *Erie Railroad Co. v. Tompkins, supra.* In the instant case, Pennsylvania law dictates that after a sheriff's sale the foreclosed mortgagor-taxpayer has no right, title or interest remaining in the foreclosed real estate. Since it would be an unconstitutional invasion of state rights to usurp the state's prerogative to determine such rights by its own laws, the Government's contention that the federal scheme is so designed, must be erroneous.

There is no disagreement with the Government's contention that a federal plan for extinguishment and discharge of federal tax liens exists. It is submitted, however, that such matters have no application in the subject case. Divesting a lien differs from extinguishing it. In this regard reference is made to the opinions in this case of the courts below: of the District Court at 164 F. Supp. 357 and of the Circuit Court at 264 F. 2d 762.

The Government indulges in a search of the House Committee (H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1-2) reports on 28 U.S.C. 2410 to support its conclusion that by necessary implication federal tax liens can never be eliminated (divested) through state court proceedings.

Nowhere in these reports is this sweeping statement made and nothing contained in these reports would indicate that the federal procedure desired was anything but a statute whereby the Government would give its consent to be joined or named as a defendant in an execution proceeding in a state whose laws require that all junior lienors must be named or joined therein before clear title can be given to the execution sale purchaser. *U. S. v. Cless*, 254 F. 2d 590. *U. S. v. Boyd*, 246 F. 2d 477 (5 Cir. 1957), cert. den. 355 U.S. 899. Pennsylvania law requires no such joinder of junior lienors. Pa. Stat. Ann. tit. 12, secs. 2441-2444, Act of June 16, 1836, P.L. 755.

The Government credits Congress with the passage of 28 U.S.C. 2410 for the purpose of establishing the exclusive procedure for discharge of federal liens for the reason that there existed "no method whereby the [federal] lien for taxes may be discharged without payment". This statement when read in the light of the Act of Congress passed pursuant thereto is entirely without foundation. This statement must be limited by additional facts relative to the position of execution creditors in the several states of the union. In some states equity actions must be commenced by the execution creditor wherein all junior lienors are named or joined as defendants. To name the sovereign without its consent being impossible, legislation was needed to equalize the rights of those in such states with those in states having laws similar to Pennsylvania. Read in this light, the above quotation portends a remedy for an entirely different problem.

In its decision, the district court disagreed with the contention that the Government had been properly joined under 28 U.S.C. 2410 (R. 27) but rested its decision on a

more basic concept. Nevertheless, the procedure regarding this phase of the case does merit close consideration.

At the trial of this case the Government counsel contended that there was no compliance with Section 2410 procedure because this sheriff's sale was not a "judicial sale". He had no argument against the notice given the Government or its joinder in the execution but stated (R. 53):

> "Mr. Coe: We admit that the service requirement was met, we admit the petition was served upon us and contains the interest of the United States with particularity, which is one of the requirements. But the third requirement of the statute is that there be a judicial sale to divest the Federal liens. And we maintain there has been no judicial sale."

Then again (R. 56) we find the following:

> "The Court: Of course, what Mr. Coe is hanging his hat on now is the words 'judicial sale'. Is that right?
>
> Mr. Coe: That is right."

All execution process in this case is governed by Pennsylvania law. All sales of real and personal property made by the sheriff in pursuance to his official duties are "judicial sales".

To put the matter completely at rest, we have but to refer to the Act of the Pennsylvania Legislature in defining this term. See Pa. Stat. Ann. tit. 46, sec. 601, Item 57, which states:

> "A judicial sale is a sale conducted by an officer or person authorized for the purpose by some competent tribunal."

In the instant case the sale was duly authorized in a writ directed to the sheriff. The authority for the writ eminated from the Common Pleas Court. This has been the long established practice in Pennsylvania. Under the law of Pennsylvania the sheriff in making such sales is required to advertise, post the premises, describe the property, hold an open auction for bidding and accepting bids, etc., etc. That is exactly what was done in the case at bar. In the case of *Pennsylvania Company vs. Broad Street Hospital*, 354 Pa. 123, 47 A. 2d 281 at page 282 the Supreme Court of Pennsylvania in discussing sheriff sales said:

> "It is elementary that all judicial sales must be open to free and fair competition."

Under the circumstances, therefore, it is contended that the sale in question was a "judicial sale", that the Government is now estopped to question the validity of that sale and that it is also estopped to question the fact that it was properly joined as a party under Section 2410 aforesaid. The doctrine of estoppel is invoked because the Government by its acts recognized and ratified the sale and proceeded under that portion of Section 2410 (c) which allows it one year in which to redeem by attempting a redemption (R. 41). Furthermore, since the United States failed in its effort to redeem within one year from the sheriff's sale, it was within the province of the lower court to have entered judgment for the defendants on this narrower ground if it had seen fit to do so.

Although the Government sought alternative relief in its original action in the district court claiming that it had made a sufficient tender under Section 2410 in order to

redeem this property it has abandoned this claim on appeal. Clearly the Government's tender of $6,575.42 was inadequate and insufficient. *Collins v. Riggs*, 81 U.S. 491. Therefore, in addition to the reasoning of the decisions of the district and circuit courts, the Government should be precluded from exercising any rights under Section 7403, having previously failed in its right of redemption under Section 2410.

In its argument (pages 9, 10 and 11 of its brief) the Government asserts a proposition that is manifestly improper. It attempts to argue on appeal, for the first time, a matter that was not before the lower court, namely, the market value of the subject real estate. A review of the testimony produced in this case shows that there was not a scintilla of evidence offered or attempted to be offered by the Government concerning the value of this real estate. Therefore, any mention of a "windfall" or any "excess" over the mortgage debt is unwarranted and clearly out of place. See *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954), where the Court held:

> "Of course we will not undertake to review what the Court below did not decide".

Again in the case of *Commissioner of Internal Revenue v. Gregory Run Coal Co.*, 212 F. 2d 52 the Court said:

> "The details underlying this contention are not clearly set forth on the record, or in the briefs of the parties and the point is raised for the first time on this appeal. Ordinarily an appellate court does not give considerations to issues not raised below. Hormel v. Helvering, 312 U.S. 552, 556."

To summarize, the following precepts are asserted as controlling the real issues in the case at bar:

(a) that property rights are created by state law: *Morgan v. Commissioner*, 309 U.S. 78, 80;

(b) that no attribute of sovereignty of the United States can increase the interest of a property owner. *Trust Co. of Texas v. United States*, 3 F. Supp. 638;

(c) that state law establishes the status of mortgages and other liens on real property. *Erie Railroad Co. v. Tompkins*, supra;

(d) that when real estate is encumbered first, by a mortgage and then by other junior liens, foreclosure proceedings by sheriff's sale on the mortgage and the resulting change in property rights are governed by state law. *Erie Railroad Co. v. Tompkins*, supra, *United States v. Bess*, supra;

(e) that in such instances junior federal tax liens, as such, are not extinguished, abolished or wiped out generally by operation of such state law, the taxpayer's liability thereon remains unaffected, but the government must look to other sources for payment as its liens are divested from the real property so executed upon. *United States v. Boyd*, supra. *United States v. Cless*, supra.

CONCLUSION

In view of the foregoing, counsel for appellees respectfully represent that the appeal in the instant case should be denied and the judgment of the Circuit Court affirmed.

Respectfully submitted,

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Attorneys for Appellees.

January, 1960.

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No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM 1959

No. .....

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

To: *The Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States*

Petitioner BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, respectfully prays that a writ of certiorari issue to review the decision and decree of the Court of Appeals for the Ninth Circuit entered in the above cause, No. 16034 on the docket of said court, on Feb. 2, 1959; petition for rehearing denied May 1, 1959.

Opinions below

There were two opinions in the United States Court of Appeals for the Ninth Circuit. Copies are appended hereto as Exhibit A and are reported as *United States v. Bank of America N.T. & S.A.*, 265 F.2d 862. There was no opinion in the District Court.

Jurisdiction

(i) The dates of the judgments or decrees sought to be reviewed and the times of their entries are as follows:

Original opinion and judgment filed February 2, 1959. Supplemental opinion and order denying petition for rehearing filed May 1, 1959.

(ii) The statutory provisions believed to confer upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari are 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c); also Rule 22 of the Rules of this Court.

The Questions Presented for Review

The sole questions presented for review are, when there is a private lien on real and personal property, and an inferior tax lien is subsequently created in favor of the United States (1) Does the exercise of a right of private sale by the holder of the first lien free the property from the inferior tax lien? (2) Does the United States have a one year right of redemption after the exercise of the right of private sale?

Statutes Involved

The principal statutes involved are 26 U.S.C. 6321 and 28 U.S.C. 2410, quoted in Exhibit B hereto.

Statement of the Case

On February 13, 1953, Sierra Title Company, a California corporation, borrowed certain sums from Petitioner and secured the borrowing by the execution and delivery

to Petitioner of a deed of trust and chattel mortgage on certain real and personal property owned by the borrower (Transcript of Record[1] pages 20, 21). Title to the property was subsequently conveyed to Sierra Wood Products Corporation, subject to the deed of trust and chattel mortgage. Thereafter on February 19, 1954, there was filed in the Office of the County Recorder of Calaveras County, California, where the real and personal property in question were located, a notice of federal tax lien as to Sierra Wood Products Corporation (R 22).

Sierra Wood Products Corporation thereafter defaulted as to the indebtedness due Petitioner and Petitioner, in full compliance with California law and with the terms of the deed of trust and chattel mortgage, sold the real and personal property at a public auction, at which Petitioner became the purchaser. Petitioner gave all notices required by California law, but did not give a specific notice to the United States Government, although the latter could have obtained specific notice by filing a request for notice with the County Recorder of Calaveras County as provided for in Section 2924(b) of the California Civil Code (R 23).

After the sale Petitioner filed an action in the California Superior Court, Calaveras County, to quiet title to the property (R 4). Respondent thereupon petitioned for removal of the action to the United States District Court (R 3), where Petitioner moved for summary judgment, which was granted (R 57 and 58). From this judgment Respondent appealed to the United States Court of Appeals for the Ninth Circuit where the decision was reversed and summary judgment was granted to Respondent (R 66).

The California Constitution vested jurisdiction as to the quiet title action in the Superior Court of Calaveras County.

1. Hereinafter referred to as (R).

By 28 U.S.C. 2410 the United States consented to suit in the State Court. The District Court acquired derivative jurisdiction upon removal pursuant to 28 U.S.C. 1444. (R 69).

Argument

Certiorari should be granted because there exists a direct conflict in the circuits as to the first question presented in this case. The Fifth and Third Circuits have held that the exercise of a right of private sale under a prior private lien in accordance with State law frees the property from the federal tax lien. *United States v. Boyd*, 246 F.2d 477 (C.A. 5th 1957), cert. den. 355 U.S. 889, and *United States v. Brosnan*, 264 F.2d 762, (C.A. 3d 1959). Directly in conflict and holding the opposite are this case and *Metropolitan Life Ins. Co. v. United States*, 107 F.2d 311 (C.A. 6th 1939), cert. den. 310 U.S. 630.[2]

A further reason for granting a writ is that both the above question and the related question as to the right of redemption constitute important questions of federal law which have not been but should be settled by this court. It is certainly important that the rights of the Government and of the taxpayers should be clear and certain.

The result of this case and of the *Metropolitan* case is that both the holder of the private lien and the United States Government are confronted with the burden of a judicial action which can be of no real benefit to either party, can only add to the burden of the federal courts and without rhyme or reason increase the cost and delay for all concerned, including the Government.

The position of Petitioner is that the decisions of the District Court in this case and the Courts of Appeal in the

2. In the *Metropolitan* case there was a dissent which in the opinion of Petitioner represents the correct view.

Rood and *Brosnan* cases were correct. When a debtor has given a deed of trust he has diminshed his property rights and the property involved becomes subject to defeasance in the manner prescribed in the deed of trust. It is upon this diminished bundle of property rights that the subsequent federal tax lien attaches. When the right of private sale is exercised the debtor has simply lost his property; the tax lien is not eliminated or released, but continues as to any other property of the debtor. What has happened is that the property subject to the deed of trust and tax lien has ceased to be the property of the debtor. The situation is the same as if the federal tax lien had attached to a life estate and the debtor had died before any proceedings to enforce the lien had been completed. It should be emphasized that the exercise of the right of private sale is fully authorized under the State laws which create and limit the property rights of the debtor. *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940), *United States v. Bess*, 357 U.S. 51, 55.

In the absence of any statute specifically providing otherwise, it seems both logical and correct that in this area the Government and the individual lienholder should be on the same footing. In the House Reports dealing with the legislation pertaining to filing of notice of tax liens the following appears:

> "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."
>
> H.R. Rep. No. 1018, 62d Cong. 2d Sess. Page 2 (1912)

The second question, pertaining to the right of redemption specified in Subparagraph (c) of 28 U.S.C. 2410, should not affect the answer to the first question, because if preservation of the right of redemption is required this can be accomplished under the statute, while also giving the de-

sired effect to the private sale. This question of redemption was not considered in any detail in the *Brosnan*, *Boyd* or *Metropolitan* cases. However, the Court of Appeals in this case, particularly in the Supplemental Opinion, stressed its conclusion that the procedure followed by Petitioner was improper because the Government would be denied this right of redemption.

28 U.S.C. 2410 does not specifically state that a right of redemption is a condition to the filing of suit against the United States. Subsection (a) refers to mortgages upon real or personal property. The first sentence of Subsection (c) states that a *judicial sale* in any such action shall have the same effect as may be provided under local law. This would be sufficient to grant the Government a right of redemption in those states in which such a right is provided for under the local law as to judicial sales. This first sentence certainly refers to both real and personal property. The second sentence states a fundamental rule and the use of the word "sale" without modification would appear to include both judicial and nonjudicial sales relating to both real and personal property. The third sentence dealing with the right of redemption again uses the word "sale" without modification, but is limited specifically to real property. Each sentence appears to be complete in itself and not interdependent either with any other sentence or with Subsection (a). In view of the fact that in the first sentence a "judicial sale" is specifically referred to and in the second two sentences the word "sale" only is referred to, the statute is susceptible of the construction that the Government would have the right of redemption after any sale, whether judicial or not. This interpretation would justify the implication in the *Boyd* and *Brosnan* cases that the Government had a right of redemption, and would give meaning to all

portions of the statute. Certainly from the standpoint of the Government a statutory provision which is for the protection of the Government should be broadly rather than narrowly interpreted. In any event this is an important question of federal law which has not been but should be settled by this Court.

Conclusion

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated: San Francisco, California, July 2, 1959.

Respectfully submitted,

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(Appendix Follows)

Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, *Appellee.*	No. 16,034 Feb. 2, 1959

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Appellee was the owner and holder of a deed of trust and two chattel mortgages executed on February 13th and April 9th, 1953, covering property of Sierra Wood Products Corporation. In February and April, 1954, appellant filed notices of lien for unemployment withholding taxes owed by this corporation. Upon default in the performance of the obligations secured by the deed of trust and chattel mortgages, appellee foreclosed the trust deed pursuant to power of sale therein contained and the chattel mortgages pursuant to a pledgee's power of sale and the provisions of the chattel mortgages. It was stipulated that all "necessary and proper procedures" for these foreclosures "were duly performed," and the property was sold at public auction on March 15th, 1956. No actual notice of the sale was

given appellant, and no request for notices of sales or default was filed for record as provided in Cal. Civ. Code § 2924(b).[1]

On May 3, 1957, appellee instituted this action to quiet title in the Superior Court of the State of California, in and for the County of Calaveras. Appellant removed to the United States District Court for the Northern District of California, Southern Division, pursuant to 28 U.S.C.A. § 1444. Both parties filed motions for summary judgment. The District Court granted the motion of appellee and entered judgment decreeing the liens of the United States extinguished.

Two contentions were advanced by appellant: (1) that the District Court lacked jurisdiction; and (2) assuming jurisdiction, the court erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

The California Constitution conferred jurisdiction of the subject matter upon the Superior Court of Calaveras County.[2] By 28 U.S.C.A. § 2410, the United States consented to be sued in the State Court.[3] The District Court

[1] This section provides for filing request for a copy of notices of default and sale under deed of trust with power of sale and for mailing copy of such notices to person filing request.

[2] "The Superior Court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided * * *)

* * *

"* * * all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. * * * " (Article VI, Sec. 5).

[3] "Under the conditions prescribed in this section and section 1444 of this title * * * the United States may be named a party in any civil action or suit . . . in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (§ 2410(a)).

acquired jurisdiction upon removal pursuant to 28 U.S.C.A. § 1444.[4]

It is true, as the Government contends, that Section 2410 does not confer jurisdiction upon district courts to entertain quiet title actions, but simply waives sovereign immunity from suit.[5] Nor may federal jurisdiction be predicated merely on the fact that the United States is a party.[6] Here, however, the state court in which the action was instituted had jurisdiction, and appellant invoked jurisdiction in the federal courts by removal.

Appellant contends that the remedy provided in Section 7424, Int. Rev. Code of 1954[7] is the exclusive method of clearing title to property covered by a federal tax lien. This section provides that the holder of a prior lien or interest of record "or any person purchasing the property at a sale to satisfy such prior lien or interest," may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section 7403.[8] If suit is not authorized within six months, "such person or purchaser" may file a petition in a United States District Court for leave to file a civil action for a final determination of all claims to or liens upon the property. After a full hearing, the district court "may in its discretion" enter an order granting leave to file such civil action, in which the United States and all persons having liens upon

---

[4] "Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." (§ 1444).

[5] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842; Seattle Association of Credit Men, 9 Cir. 1957, 240 F. 2d 906.

[6] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842.

[7] 26 U.S.C.A. § 7424.

[8] 26 U.S.C.A. § 7403, which provides for civil actions in a district court of the United States to enforce federal tax liens.

or claiming any interest in the property shall be made parties.

28 U.S.C.A. § 2410[9] specifically provides that the United States may be named as a party defendant in an action to quiet title or foreclose a mortgage on which the United States has a mortgage "or other lien." It provides in subsection (d) that the holder of a lien upon property on which the United States has a "junior lien other than a tax lien" may make written request to have the lien extinguished in the same manner as a tax lien. This provision in subsection (d) clearly implies that subsections (a), (b) and (c) are general in nature and include tax liens.

Under Section 2410 as originally enacted in 1931, the United States gave the holder of a mortgage on real property, subject to a government lien, an additional remedy by consenting to be made a defendant in a suit to foreclose the mortgage. The provisions of the 1931 Act were expanded in 1942 to include actions to quiet title to real and personal property and actions to foreclose liens on personal property.[9]

The provisions of Section 7424, Int. Rev. Code of 1954, were first enacted in Section 1030, Int. Rev. Code of 1924, and reenacted in Section 1127 of the Revenue Act of 1926 and Section 3679, Int. Rev. Code of 1939. The Codes of 1939 and 1954 both contained express cross-references to Section 2410.[10] It is our conclusion that Section 7424, Int.

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[9]The provisions of Section 2410 were originally enacted as the Act of March 4, 1931, c. 515, 46 Stat. 1528; expanded by the Act of Dec. 2, 1942, c. 656, 56 Stat. 1026; and the present law enacted by Act of June 25, 1948, c. 464, 62 Stat. 869, and amended by Act of May 24, 1949, c. 139, § 119, 63 Stat. 105.

[10]Section 3680 of 1939 Code and Section 7425 of 1954 Code, which reads: "(5) For provisions permitting the United States to be made party defendant in a proceeding in a state court for the foreclosure of a lien upon real estate where the United States may have claim upon the premises involved, see Section 2410 of Title 28 of the United States Code."

Rev. Code of 1954 and Section 2410 of Title 28 prescribe alternative remedies for removal of a federal tax lien.

In addition, administrative procedures are set forth in Section 6325, Int. Rev. Code of 1954, whereby the Secretary of the Treasury or his delegate may release the lien where the liability is satisfied, a bond is furnished, or the interest of the United States is determined to have no value.

Appellee here proceeded under Section 2410 of Title 28. It contends that the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished. The Government contends that Section 2410 requires a judicial sale, relying upon the provisions of subsection (c), which contemplate a "judicial sale" on foreclosure, give the United States, in case of real property, one year within which to redeem, and provide that the United States may ask by way of affirmative relief for foreclosure of its own lien.[11] The Bank argues that subsection (c) relates only to foreclosure actions and not to quiet title actions.

The federal tax lien here involved was created by Section 3670, Int. Rev. Code of 1939 (Section 6321 of 1954 Code) which provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount" (with interest penalty and costs) "shall be a lien

[11] Section 2410 (c) reads in part: "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *."

in favor of the United States upon all property, whether real or personal, belonging to such person." Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law."[12] "However, once it has been determined that state law creates sufficient interests * * * to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by the United States."[13] And, as this Court said in Bank of Nevada v. United States, 1957, 251 F. 2d 820, 824, cert. den. 356 U.S. 938, 2 L. Ed. 2d 813, 78 S. Ct. 780, "the Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

The federal tax lien attached to "all property and rights to property" belonging to the taxpayer. The interest of a taxpayer at the time the liens attached was subject to defeasance under state law upon exercise of power of sale contained in the deed of trust.[14] But can a federal tax lien upon a mortgagor's interest in property be extinguished by the exercise of such a power of sale?

There is a conflict of authority on this question. Metropolitan Life Ins. Co. vs. United States, 6 Cir. 1939, 107 F. 2d 311, cert. den. 310 U.S. 630, 84 L. Ed. 1400, 60 S. Ct. 978, tends to support the Government's position. There, a suit was brought under R.S. § 3207, a predecessor of Section 7424, asking that a junior federal tax lien be decreed extinguished by reason of a sale of property pursuant to a power contained in the mortgage. The District Court held that the Government's lien had not been extinguished and ordered

[12]United States v. Bess, 357 U. S. 51, 57, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

[13]Id. at 56; 57. See also Fidelity & Deposit Co. v. New York City Housing Auth. 2 Cir. 1957, 241 F. 2d 142, 144.

[14]Carpenter v. Smallpage, 220 Cal. 129, 29 P. 2d 841 (1934); Stifeiff v. Darlington, 9 Cal. 2d 42, 68 P. 2d 728 (1937).

the property sold and the proceeds first applied to the mortgagee's claims and the balance, if any, paid to the Government. The Court of Appeals affirmed on the theory that the District Court had no jurisdiction to extinguish the lien other than by judicial sale, and said that the question was not "what binding effect the power of sale conferred by the mortgage had on subsequent lienors." However, it is evident from the opinion that the court did not consider the lien extinguished. The court stated that "federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal, and when such liens once attach, they may be lifted only as provided thereunder." (107 F. 2d at 313). "The United States as a sovereign may be sued only with its consent. It follows that the Congress has the power to prescribe not only the methods by which, and the conditions under which, tax liens on real estate may be released, but also to limit the right to sue therefore and no suit may be maintained against the United States for such purpose unless strictly within the terms of the Statute . . . , under which consent is given." 107 F. 2d at 314.[15]

On the other hand, the Fifth Circuit in United States v. Boyd, 1957, 246 F. 2d 477, cert. den. 355 U.S. 889, 2 L. Ed. 2d 188, 78 S. Ct. 261, held that the non-judicial foreclosure of a mortgage lien pursuant to a valid power of sale extinguished a federal tax lien which was inferior to the mortgage lien, and the able trial judge held for appellant on the basis of this decision. In United States v. Boyd, the court said: "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it

[15]United States v. Kensington Shipyard & Drydock Corp., 3 Cir. 1948, 169 F. 2d 9, also tends to support the Government's position.

be a private or a federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S.C.A. § 2410, or Section 7403, or a 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclo....., it cuts off all junior liens, including those of the Government." 246 F. 2d at 483.[16]

In spite of its holding that the tax lien was extinguished by the non-judicial sale, the Boyd case gave effect to the provisions of § 2410(c), the court calling attention to the fact that the District Court had "read the statutes of the United States as a composite body to allow to the Government * * * the statutory right to redeem after the sale within one year." The Court of Appeals said further, "The Government's rights have been fully preserved by the right of redemption which continues for the full year, not counting the time it has been suspended during the pendency of this appeal * * *."

This portion of the Boyd opinion is criticized by both parties. The Bank argues that it was not necessary to the decision and, in effect, is inconsistent with the conclusion that the lien was extinguished. The Government suggests that since the action was not conducted under Section 2410 (but rather under Section 7403), "it is difficult to under-

[16]The dissenting opinion in the Metropolitan Life case succinctly expresses the rationale of the appellee: "I am in general accord with the view of the majority as to the plenary nature of the federal power of taxation. However, I cannot concede that this power enables the United States to acquire a lien upon any greater property interest than its tax debtor owns. In the case at bar, the interest of the tax bidder was subject to destruction by exercise of the power of sale . . . The tax lien attaches only to the destructible interest that remains in a mortgagor after execution of a mortgage with a power of sale." See also United States v. Cless, 3 Cir. 1958, 254 F. 2d 590; United States v. Brosnan, W.D. Pa. 1958, 164 F. Supp. 357.

stand" how the redemption provisions of Section 2410(c) "could have any application."

We are unable to reconcile the conclusions in the Boyd case (1) that the lien was extinguished and (2) that the Government still had a right to redeem under Section 2410 (c).

The Bank argues that the government lien attached only to the property rights of the taxpayer, and since those rights were subject to defeasance under the prior trust deed, the lien was subject to foreclosure in the manner prescribed in the trust deed. The Government contends that once the lien attached to the property it could be removed only in a manner prescribed by Congress, relying upon the rule that the enforcement and removal of the lien are governed by federal rather than state law.

While the question is close, we are persuaded that the Government's position is correct. It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress. The Bank seeks to clear title under Section 2410. It would avoid the effect of subsection (c) by foreclosing under power of sale and then instituting an action to quiet title. It is conceded that in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption. May the Bank do indirectly what it could not do directly?

In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.

Appellee is not without remedy. Its interest in the property to the extent of the amount due under the trust deed and mortgages remains prior to the federal lien.[17] It can commence an action to remove the lien under Section 7424 of the Internal Revenue Code of 1954. It can file an application with the District Director of Internal Revenue for an administrative discharge of the property from tax liens under Section 6325(b) of Title 26, U.S.C.A. It can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410. To hold for the appellee would divest the United States of its interest in property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien.

Judgment reversed.

(Endorsed:) Opinion. Filed Feb. 2, 1959.

Paul P. O'Brien, Clerk.

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[17]The Federal tax lien is effective only as to that portion of the value exceeding the amount of the mortgages and deed of trust.

On Petition by Appellee for Rehearing

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Upon consideration of appellee's petition for rehearing, we have concluded that our opinion, and particularly the next to the last paragraph, requires clarification. The following is supplemental to the original opinion:

It is well settled that "a proceeding against property in which the United States has an interest is a suit against the United States".[1] It is our view that a tax lien, even though junior to a mortgage, is such an interest in property,[2] and may be divested only with the consent of the United States and in the manner prescribed by Congress.

In enacting Section 2410, Congress did more than simply provide for waiver of immunity from suit. It imposed a condition for divestiture of the property rights of the United States, i.e., a period of redemption from the foreclosure sale. If Section 2410(*c*) is limited to foreclosure by action, followed by a judicial sale, then a Government lien could be extinguished, without notice and without right of redemption, where the mortgagee proceeded under a power of sale; whereas, in foreclosure by action, the Government would have a right of redemption, regardless of state law,—a wholly illogical result in those states, for ex-

[1]United States v. Alabama, 1941, 313 U.S. 274, 282, 61 S.Ct. 1101, 85 L.Ed. 1327. See also The Siren, 1868, 7 Wall. 152, 19 L.Ed. 129; Carr v. United States, 1879, 98 U.S. 433, 25 L.Ed. 209, 211; State of Minnesota v. United States, 1939, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; Metropolitan Life Ins. Co. v. United States, 6 Cir. 1939, 107 F.2d 311, cert. denied 310 U.S. 630, 60 S.Ct. 978, 84 L.Ed. 1400.

[2]The Third Circuit reached a contrary conclusion in United States v. Cless, 1958, 254 F.2d 590, and United States v. Brosnan, 1959, ... F.2d .....

ample, which do not provide any right of redemption. In our opinion, a compliance with subsection (c) is a condition of the Government's consent to be sued in any foreclosure under Section 2410. This requires a judicial proceeding in which the Government may assert its lien and the right of redemption within one year from the date of sale.

Subsection (c) was a part of Section 2410 when the provision was added permitting the United States to be sued in a quiet title action. The purpose of that provision was to allow the clearing of real estate titles of questionable or valueless government liens,[3] but where the lien, though junior, is a valid lien, the Government's consent is predicated upon its right to assert its lien and to redeem from the sale. . .

The sole issue presented in this case by agreement of the parties was whether the sale under the power contained in the mortgages gave the purchaser a title free and clear of

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[3]Senate Report No. 1646, 77th Cong. 2d Sess. (1942) which accompanied H.R. 5578, the bill which amended Section 2410 in 1942, quotes a letter from the Attorney General to the Chairman of the House Committee on Judiciary, which reads in part:

> "It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. Welch v. Hamilton (S.D. Calif.) 33 F. (2d) 224, and U.S. v. Turner (C.C.A. 8), 47 F. (2d) 86.
>
> "In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgages have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

This is not the type of case suggested by the Attorney General. Here the bank itself was the mortgagee, foreclosed its mortgage with constructive, if not actual, knowledge of the Government lien, became the purchaser at foreclosure sale, and then itself instituted the action to quiet title.

federal tax liens. In our opinion this question must be answered in the negative. A valid federal tax lien may not be extinguished in this manner.[4]

The petition for rehearing is denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed May 1, 1959.

Paul P. O'Brien, Clerk.

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[4]Legislation to clarify the procedure under Section 2410 is proposed in a comprehensive report of the Committee on Federal Tax Liens of the American Bar Association and adopted by its House of Delegates in February, 1959.

Exhibit B

26 U.S.C. § 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

28 U.S.C. § 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. (As the section read prior to the 1958 Amendment.)

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States

at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same

extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

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SUPREME COURT, U. S.

FILED

JUL 23 1959

JAMES R. BROWNING, Clerk

No. 128

Supreme Court of the United States

OCTOBER TERM, 1959

[redacted] NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER,

vs.

[redacted] STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The question in this case is whether a junior federal tax lien may be extinguished by a sale of the property by a mortgagee under a contractual power of foreclosure and sale contained in the mortgage. Substantially the same question is presented in *United States* v. *Brosnan*, No. 137, this Term, decided by the Third Circuit, in which the Government filed a petition for certiorari on June 23, 1959. The court below expressly recognized (Pet. App. 11) that

its conclusion here was contrary to that reached by the Third Circuit. The court also recognized (Pet. App. 6-9) a conflict with the decision of the Fifth Circuit in *United States* v. *Boyd*, 246 F.2d 477, certiorari denied, 355 U.S. 889. The decision below is, however, in accord with that of the Sixth Circuit in *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311, certiorari denied, 310 U.S. 630.[1]

The fact that this case, as well as the *Boyd* and *Metropolitan Life Ins. Co.* cases, involves a power of sale contained in a mortgage while the *Brosnan* case involves a sale in execution of a confessed judgment does not appear to have significance. The legal principles involved are identical, and the essential conflict in the lower courts should be resolved. The question presented vitally affects many property transactions throughout the country and is important to the uniform collection of taxes. Accordingly, the Government does not oppose certiorari.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JULY, 1959

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[1] See also the opinion of the Third Circuit in the *Brosnan* case. (Petition in No. 137, this Term, p. 15.)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Brief

OPINIONS BELOW

There is no reported opinion of the District Court. The memorandum decision of the District Court appears in the record at pages 57 and 58. The original opinion of the Court of Appeals is reported as *United States v. Bank of America N. T. & S. A.*, 265 F.2d 862 (9th Cir. 1959). A supplemental opinion appears at page 868.

JURISDICTION

The original opinion (R. 66-74) and the judgment based thereon were filed and entered February 2, 1959 (R. 75).

The supplemental opinion (R. 76-78) was filed May 1, 1959. The petition for a writ of certiorari was filed July 6, 1959, and was granted on October 12, 1959 (R. 79).

This Court has jurisdiction under the provisions of 28 U.S.C. (1952 ed.) §§ 1254(1) and 2101(c) and Rule 22 of the Rules of this Court.

STATUTES INVOLVED

The principal statutes involved (which are printed in Appendix A hereto) are Sections 3670, 3671 and 3672, Internal Revenue Code of 1939 (now Sections 6321, 6322 and 6323, Internal Revenue Code of 1954) and 28 U.S.C. (1952 ed.) § 2410.

QUESTIONS PRESENTED FOR REVIEW

(1) Does the purchaser of land and chattels at a foreclosure sale, held pursuant to power of sale in a first deed of trust and chattel mortgages, acquire title free of subordinate tax liens of the United States?

(2) May such a purchaser establish his clear title by a quiet title suit against the United States?

(3) Does the United States have a right of redemption after a foreclosure pursuant to a contractual power of sale?

STATEMENT OF THE CASE

On February 13, 1953, Sierra Title Company, a California corporation, borrowed money from Petitioner, Bank of America (hereinafter called "Bank"), and secured its borrowing by a deed of trust and a chattel mortgage covering certain land and chattels owned by the borrower (R. 20-21). On April 9, 1953, Sierra Wood Products Cor-

poration, another California corporation, borrowed money from Bank and secured its borrowing by a chattel mortgage covering certain other chattels owned by it (R. 21). On September 28, 1953, Sierra Title Company transferred its equity in the property covered by its deed of trust and chattel mortgage to Sierra Wood Products Corporation (R. 21). Thereafter various taxes were assessed by the United States against Sierra Wood Products Corporation (hereinafter called "Taxpayer"). Notices of tax lien were filed, and all or portions of such taxes remain unpaid (R. 22).

Taxpayer thereafter defaulted on its indebtedness to Bank, and Bank, in full compliance with California law and with the terms of the deed of trust and chattel mortgages, caused the land and chattels to be sold at public auction in accordance with its contract powers of sale and became the purchaser at that sale. Bank gave all notices required by California law but did not give any special notice to the Government, which had failed to request special notice under the provisions of Cal. Civ. Code § 2924b (R. 22-23).

Thereafter, Bank filed an action in the California Superior Court for Calaveras County to quiet title to the land and chattels (R. 4-8). The Government petitioned for removal of the action to the United States District Court (R. 3) where Bank's motion for summary judgment was granted (R. 57-58). The Government appealed to the Court of Appeals (R. 61) where the judgment of the District Court was reversed (R. 75). Bank's petition for rehearing was denied by the Court of Appeals on May 1, 1959 (R. 75, 76), and its petition for certiorari was granted by this Court on October 12, 1959 (R. 79).

SUMMARY OF ARGUMENT

The tax liens attached only to property and rights to property belonging to Taxpayer. Neither at the time the tax liens arose, nor at any time thereafter, did Taxpayer own more than the defeasible rights remaining after the deed of trust and chattel mortgages had been given to Bank. The rights of Taxpayer were subject to absolute termination upon foreclosure pursuant to the powers of sale held by Bank. Bank acquired a clear title by purchasing at the foreclosure sale.

The Government's consent to be sued in a quiet title action is not conditioned on existence of a right of redemption, although, if a right of redemption on the part of the Government were crucial, 28 U.S.C. (1952 ed.) § 2410 could be construed to provide a right of redemption following a nonjudicial foreclosure sale. Even this interpretation would require reversal of the decision below.

ARGUMENT

Point I—The Government's Subordinate Tax Lien Attached Only to Defeasible Rights to Property of the Taxpayer Which Thereafter Ceased to Exist.

The Government's tax liens arose under the following statutory provision:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 1939 Internal Revenue Code § 3670.

Since the Government's tax liens are statutory, their scope and effect must be determined by the statute and the decisions interpreting it. *Mackenzie v. United States*, 109 F. 2d 540 (9th Cir. 1940). The Government's tax liens are

expressly limited to property and rights to property belonging to the taxpayer. By virtue of the foreclosure sale, the taxpayer no longer has either "property" or "rights to property" in the land and chattels affected by this action.

A tax lien statute creates no property or rights to property but merely attaches consequences to such rights which are created under state law. *United States v. Bess*, 357 U.S. 51, 55. What constitutes property or rights to property to which the Government's tax liens can attach must be determined by reference to state law. *Metropolitan Life Ins. Co. v. United States*, 107 F.2d 311, 313 (6th Cir. 1939) *cert. denied* 310 U.S. 630. This Court defined the operating relationship between state law and federal revenue acts in *Morgan v. Commissioner*, 309 U.S. 78, 80: "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

California law is clear that a sale pursuant to a power of sale effectively terminates the defeasible rights of the trustor under a deed of trust or the mortgagor under a mortgage and incidentally all rights of any subordinate lienholder. Title may be quieted in a purchaser at a foreclosure sale conducted under such a power of sale. *Carpenter v. Smallpage*, 220 Cal. 129, 29 P.2d 841 (1934). The exercise of the power of sale in a deed of trust passes a title absolute as to all subordinate claimants. *Streiff v. Darlington*, 9 Cal. 2d 42, 68 P.2d 728 (1937). The title acquired by a purchaser at such a sale is equivalent to the title acquired by a purchaser at a foreclosure sale conducted pursuant to a court decree (*Fighiera v. Radis*, 180 Cal. 660, 664, 182 Pac. 418 (1919)) and such purchaser obtains all incidents of title as well as title itself. *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 255 Pac. 1097 (1927) *cert. denied* 275 U.S. 571. The rights of a chattel

mortgagor and those claiming under him are similarly terminated upon the exercise of a power of sale because the statute authorizing powers of sale (Cal. Civ. Code § 2932) is equally applicable. *Dohrman v. Durston*, 90 Cal. App. 2d 236, 202 P.2d 607 (1949); *Elmore Jameson Co. v. Smith*, 34 Cal. App. 2d 609, 93 P.2d 1063 (1939).

The basic proposition urged by Bank is that the Government's tax liens attach only to what a taxpayer has. For example, tax liens would attach to a tenant taxpayer's interest in a lease, but when the lease expired the owner of the property subject to the lease would hold it free of any lien of the Government. The Government has expressly recognized the validity of this analysis as to options. Rev. Rul. 54-154 (1954—1 Cum. Bul. 277) is as follows:

> "Federal tax liens attach to property only to the extent of the delinquent taxpayer's interest therein. Where a taxpayer has only an option to purchase real property at the time the Federal tax lien arises, the lien attaches to the option and not to the real estate. Where his rights under the option are terminable, the Government's rights, by virtue of its lien upon the taxpayer's interest, are likewise terminable, being no greater than those of the taxpayer. Accordingly, when the taxpayer's rights under an option terminate after the Federal tax lien has arisen, the rights of the United States in the option also terminate, since there is no longer any property in the option to which a lien can attach."

This analysis seems to have been rejected only by the Court of Appeals in this case. This analysis is in accord with *United States v. Brosnan*, 264 F.2d 762 (3rd Cir. 1959), *cert. granted*, 26 U.S.L. Week 3108; *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957) *cert. denied*, 355 U.S. 889; *Fidelity & Deposit Co. v. New York City Housing Authority*, 241 F.2d 142 (2nd Cir. 1957); *Metropolitan Life Ins. Co. v.*

United States, 107 F.2d 311 (6th Cir. 1939) (dissenting opinion; the majority did not reach this question) *cert. denied* 310 U.S. 630; 49 Yale L. J. 1106, 1110-1112; 53 Harv. L. Rev. 888, 889; 33 Va. L. Rev. 13, 32-38. It is significant that a nonjudicial foreclosure sale passes title free of subordinate tax liens of the State of California. *Wayland v. State of California*, 161 Cal. App. 2d 679, 326 P.2d 954 (1958).

This is an action to quiet title. Bank did not sue to remove an existing lien or claim of the Government, but rather to obtain a judgment establishing an existing fact, namely, that the Government has no lien on the land and chattels affected by the action. The Court of Appeals held for the Government. The Court of Appeals reasoned that the right of redemption, mentioned in 28 U.S.C. (1952 ed.) § 2410(c), is a condition to the Government's consent to be sued and no right of redemption is available following a nonjudicial foreclosure; therefore, the Government has not consented to be sued in this quiet title suit. Indirectly this is a holding that the foreclosure sale was ineffectual to pass clear title to Bank as purchaser. In its supplemental opinion the Court of Appeals expressly stated that the sole issue presented was whether the sale under the power contained in the deed of trust and chattel mortgages gave Bank a clear title and answered the question in the negative.

This conclusion finds little, if any, support in the *Metropolitan* case because, as pointed out in the *Brosnan* case, the proceeding in the *Metropolitan* case was one to divest an existing lien of the United States. A suit to quiet title could not be maintained at that time because consent to sue the United States in quiet title suits was first granted by the Act of December 2, 1942, c. 656, 56 Stat. 1026, subsequent to the decision in the *Metropolitan* case. In the *Brosnan* case, in the *Boyd* case, and in this case the more basic

question (whether title passed free of any lien of the United States) was decided. The conclusion of the court below is squarely opposed to the decision of the *Brosnan* case, a fact recognized by both courts, and is necessarily in conflict with the decision in the *Boyd* case.

The Government's position seems inconsistent with the evident intent of Congress to protect fully the rights of mortgagees, pledgees, purchasers and judgment creditors who acquire their rights against property of a taxpayer before notices of federal tax liens are recorded. Section 3672 of the Internal Revenue Code of 1939 (now Section 6323, Internal Revenue Code of 1954) provided that tax liens of the United States "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" in the prescribed manner. These provisions were enacted as a direct result of the decision in *United States v. Snyder*, 149 U.S. 210. *United States v. Gilbert Associates*, 345 U.S. 361, 363. The *Snyder* case held that the United States was not bound by state recording laws and that even as against a purchaser without notice the prior tax liens of the United States were enforceable.

Although Section 3672 is intended to protect mortgagees, purchasers, pledgees and judgment creditors who become such after the Government acquires tax liens, the protection extends to mortgagees, purchasers, pledgees, and judgment creditors who become such before a notice of tax lien is filed. This necessarily includes all those cases in which the favored status is acquired before the tax is assessed and the lien arises. Under the decision of the court below the Government's tax liens are not only valid as to Bank, the express provision of the statute to the contrary notwithstanding, but Bank's deed of trust and

chattel mortgages, which Congress undertook to protect, are partially invalidated.

The result reached by the Court of Appeals in this case is both unsatisfactory and unfair. It deprives Bank of the valuable right of foreclosure by power of sale and therefore of the most expeditious and economical means of realizing on its security. It gives to the Government greater rights than Taxpayer itself had. The additional rights which the Government acquires under the decision are, we believe, of slight, if any, value. The rights taken from Bank are substantial. The result is entirely without support in law.

A contrary result would be fair to both the Government and prior mortgagees. A mortgagee's rights would be neither increased nor decreased by the incidence of federal tax liens. The Government's federal tax liens would reach fully the rights to property held by taxpayers but would not exceed those rights. Mortgagees would be permitted to foreclose by the exercise of powers of sale and this would be of benefit to both mortgagees and the Government because this procedure is less costly and leads to a quicker sale. After all, in nearly all cases of this nature the taxpayer is in a distressed condition. Interest is running on both the claim of the Government and the claim of the mortgagee as the first lien holder. A taxpayer has only so much property out of which to pay all claims. The more immediate the sale, the greater the amount that can be realized for the payment of those claims. Allowing a mortgagee to exercise its power of sale is obviously the more satisfactory method from the standpoint of a taxpayer also, since the sooner his obligations can be settled the better for all concerned.

Point II—A Quiet Title Suit Against the United States (with or without a Right of Redemption) Is Expressly Authorized by 28 U.S.C. (1952 ed.) § 2410.

The conclusion of the Court of Appeals, that Bank may not have title to the land and chattels quieted because the Government does not have a right of redemption after a nonjudicial foreclosure, is contrary to the evident purpose of Congress. S. Rep. No. 1646, 77th Cong., 2d Sess. (1942), (which accompanied H.R. 5578 amending Section 2410) quotes a letter from Honorable Robert H. Jackson, then Attorney General, to Honorable Hatton W. Summers, then Chairman of the Committee on the Judiciary. After stating that the bill would extend the consent of the United States to be sued to include foreclosure actions affecting personal property, and expressing the view that no distinction should be made between real and personal property for purposes of consent to be sued, Attorney General Jackson's letter continues:

> "It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch v. Hamilton* (S.D. Calif.) 33 F.(2d) 224, and *U. S. v. Turner* (C.C.A. 8), 47 F.(2d) 86.
>
> "In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. *In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens.* Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill." (Emphasis supplied.)

The bill was reported favorably with the changes recommended by the Attorney General and was enacted with those changes.

Subsection (e) was already a part of Section 2410 when provision was made to permit the United States to be sued in quiet title actions. The change was accomplished by insertion of the words "to quiet title or" in subsection (a), as suggested by the Attorney General. Although mortgages and liens on real property could be foreclosed against the United States, the Attorney General stated there should be a procedure for clearing title where that had not been accomplished in the way already permitted. The Attorney General expressed the view that justice and fair dealing required such an alternative method of clearing real estate titles of liens of the United States. There is nothing in the legislative history to support the conclusion of the Court of Appeals in this case. Indeed, if the opinion of the Court of Appeals in this case is correct the amendment was meaningless.

If, however, a right of redemption in the Government were deemed a condition precedent to the Government's consent to be sued in a quiet title action, subsection (e) (printed in Appendix A, p. 3) could be construed to provide such a right of redemption. The first sentence of that section deals with "judicial" sales of real and personal property. The second sentence uses the word "sale" without modification and apparently refers to both judicial and nonjudicial sales of either real or personal property. The third sentence, which grants the right to redeem within one year, uses the word "sale" without modification but is expressly limited to "a sale of real estate". The third sentence may be construed either as limited to "judicial sales", which are the subject of the first sentence, or, as the words read

independently seem to say, as a rule applicable to any kind of foreclosure sale of real property only:

The latter interpretation, i.e., that subsection (c) requires a right of redemption following a nonjudicial foreclosure sale, should be adopted *only* if such right is first determined to be a condition precedent to the right to sue the United States in a quiet title action. A construction of Section 2410, providing a right of redemption following a nonjudicial foreclosure is more reconcilable with Congressional intent than the lower court's construction denying absolutely the right to sue to quiet title, but is by no means necessary.

Point III—The Government's Consent to Be Sued in a Quiet Title Suit Was Not Intended to Be Conditioned on a Right of Redemption.

The consent of the United States to be sued in a quiet title suit pursuant to Section 2410 does not appear to have been intended by the Congress to be conditioned on any right of redemption. The provision for a right of redemption "where a sale of real estate is made to satisfy a prior lien" was contained in the original statute, by which consent to be sued in foreclosure suits against real estate was given, and the redemption provision was expressly limited to real estate. Act of Mar. 4, 1931, c. 515, 46 Stat. 1528. At the time when the redemption provision was enacted, there would have been no point in referring to quiet title actions because the United States had not then consented to be sued in that manner.

In 1942, the Congress extended the consent of the United States to authorize quiet title suits against real and personal property. Act of Dec. 2, 1942, c. 656, 56 Stat. 1026. The change was accomplished by amending subsection (a) of the present Section 2410. The right of redemption already provided by the third sentence of subsection (c) was

not changed by the amendment, nor referred to in subsection (a), although the first sentence of subsection (c) was amended at that time to include personal property which was then brought under coverage of subsection (a).

The language of subsection (c) cannot be construed to require a right of redemption with respect to personal property foreclosures. In conformity with logic and apparent Congressional intent, that language should not be construed to impose a condition upon the consent to be sued in quiet title action, which consent was granted by the same Act in the same manner as the consent to foreclose on personal property.

Well established rules of statutory construction support this conclusion. Prior to the 1942 amendment the right of redemption provided in subsection (c) was applicable only following court foreclosure sales. It was a proviso qualifying the consent to such suits, and a proviso refers only to the provision to which it is attached. *United States v. McClure*, 305 U.S. 472, 478. The effect of the proviso was not changed and the right of redemption was not enlarged by the 1942 amendment because "* * * a clause in a statute will be given no different meaning after an amendment than it had before, if the amendment relates to other matters and was obviously not designed to affect its meaning." *Barber v. Palo Verde etc. Co.*, 198 Cal. 649, 651, 246 Pac. 1944 (1926).

The Congress apparently recognized that the expeditious and normally used remedy of foreclosure, pursuant to a contractual power of sale ought not to be encumbered, nor the value of deeds of trust and mortgages impaired, by the imposition of a vague right of redemption. Protection of the Government's legitimate rights does not require it, and the courts should not impose it without a clear Congressional mandate.

CONCLUSION

Taxpayer had only defeasible rights to property in the land and chattels affected by this action when the taxes involved were assessed. Taxpayer's rights were subject to termination and it is not disputed that Taxpayer's rights were terminated. Although the United States still has tax liens on all property and rights to property of Taxpayer, Taxpayer has neither respecting the land and chattels affected by this action. It follows that the land and chattels passed to Bank as purchaser free and clear of any lien of the United States.

If the Congress intended to impose a right of redemption as a condition subsequent to effective foreclosure by the exercise of a power of sale, then 28 U.S.C. (1952 ed.) § 2410(c) may be so construed as to provide such a right of redemption.

It is the Bank's contention, however, that the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed in all respects.

Dated: November 20, 1959.

Respectfully submitted,

SAMUEL P. STEWART
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Attorneys for Petitioner

(Appendix Follows)

Appendix A

Internal Revenue Code of 1939

§ 3670. Property Subject to Lien

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

§ 3671. Period of Lien

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449.

§ 3672. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors

(a) Invalidity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) Under State or Territorial laws. In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or * * * [Remainder of section not material]

28 U.S.C. (1952 ed.) § 2410

§ 2410. Actions Affecting Property on Which United States Has Lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, [including the District Court for the Territory of Alaska,]* or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service, or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law

*Bracketed words deleted by Act of July 30, 1954, c.648, § 2(a), 68 Stat. 589.

of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien. As amended May 24 1949, c. 139, § 119, 63 Stat. 105.

No.
183
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SUPREME COURT, U. S.

FILED
JAN 15 1960
JAMES R. BROWNING, Clerk

No. 183

In the Supreme Court of the United States

OCTOBER TERM, 1959

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals (R. 66–74, 76–78) are reported at 265 F. 2d 862.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959. (R. 75.) A petition for rehearing was denied on May 1, 1959. (R. 76–78.) The petition for a writ of certiorari was filed on July 6, 1959, and was granted on October 12, 1959. (R. 79.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a junior federal tax lien may be extinguished through a non-judicial sale of the property by a mortgagee under a contractual power of sale.

STATUTES INVOLVED

Pertinent provisions of the Internal Revenue Codes of 1939 and 1954, and 28 U.S.C. 2410 are set forth in the Appendix, *infra*, pp. 21–27.

STATEMENT

On February 13, 1953, taxpayer Sierra Wood Products Corporation executed and delivered to petitioner bank, as security for certain promissory notes, a deed of trust on real property which it owned in California, and a chattel mortgage (R. 20–21, 66). A second chattel mortgage was given on April 9, 1953 (R. 21, 67). The deed of trust and the chattel mortgages were promptly and duly recorded (R. 21). Both the deed of trust and the mortgages authorized the bank to sell the mortgaged property in case of default (R. 31–32, 43–44, 51–52).

Thereafter, federal unemployment taxes were assessed against the taxpayer on November 18, 1953, February 24, 1954, and March 4, 1954, in the respective amounts of $5,309.77, $6,207.58, and $328.40. Notice of federal tax liens covering the first two assessments were filed in the appropriate county recorder's office on February 19, 1954, and April 5, 1954, respectively. Of the taxes assessed, there remain unpaid $11,493.56 plus statutory interest. (R. 5–7, 18–19, 22, 67.)

When taxpayer subsequently defaulted in paying the promissory notes, the bank foreclosed its mortgages (R. 22–23, 67). The properties were sold at public auction on March 15, 1956, in compliance with the procedures in the deed of trust and the chattel mortgages (*ibid.*). The bank purchased all the property (*ibid.*). No actual notice of the foreclosure sale was given to the United States (R. 23, 67).

After the sale, the bank instituted suit against the United States in a California state court seeking a decree that the foreclosure sale had removed the federal tax liens from the property. (R. 4–8.) On petition of the United States, the action was removed to the United States District Court for the Northern District of California, pursuant to 28 U.S.C. 2410 (Appendix, *infra*, p. 25). (R. 3–4.) Both the bank and the United States filed motions for summary judgment. The District Court granted the bank's motion and entered judgment decreeing that the United States had no liens against the property (R. 57–60, 67.)

The Court of Appeals for the Ninth Circuit unanimously reversed. The court held (R. 73–74) that "[o]nce the [federal tax] lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress." It pointed out (R. 74) that "[t]o hold for the [bank] would divest the United States of its interest in

property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien." It noted (R. 74) that the bank "is not without remedy," since it can institute an action under Section 7424 of the Internal Revenue Code of 1954 "to remove the [federal] lien," file an application with the District Director of Internal Revenue for an administrative discharge of the property from the lien, or bring a foreclosure action under 28 U.S.C. 2410, in which the United States would be joined.[1]

SUMMARY OF ARGUMENT

I

In the court of appeals, the United States contended that the district court had no jurisdiction under 28 U.S.C. 2410 to entertain this action to quiet title. The court of appeals rejected this contention and, after further consideration, the Government has decided not to press the point in this Court. However, since the question is not free from doubt, we have briefly set forth in the Argument the contentions that support, and those that militate against, the holding of jurisdiction.

II

The substantive issue in this case—whether a junior federal tax lien can be discharged through the sale of the property by a prior mortgagee under a power of sale contained in the mortgage—is sub-

[1] The court rejected the Government's contention that the district court had no jurisdiction over the suit (R. 67–70). See discussion *infra*, pp. 7–13.

stantially the same as in *United States* v. *Brosnan*, No. 137, this Term. Our brief in *Brosnan* fully develops the argument that federal tax liens may be discharged only in accordance with the specific and detailed procedures provided therefor by Congress; and that they cannot be discharged in state proceedings to which the United States is not a party, even though under state law such proceedings result in eliminating non-government junior liens. In this brief we discuss only the specific points that petitioner raises.

Petitioner foreclosed its first mortgage by selling the property pursuant to its power of sale in the mortgages. At that time, federal tax liens, admittedly junior to the mortgage, had attached to the property. Petitioner then instituted this action against the United States to quiet title under 28 U.S.C. 2410, on the theory that "the [federal] tax lien extinguished by the sale held under the power of sale in the trust deed and chattel mortgages * * *" (R. 70). The court of appeals held (R. 78) that "the sale under the power contained in the mortgages * * * [did not give] the purchaser a title free and clear of federal tax liens," since "a [federal] tax lien, even though junior to a mortgage * * * may be divested only with the consent of the United States and in the manner prescribed by Congress" (R. 76). The court further held that the bank could not clear its title under 28 U.S.C. 2410.

1. Petitioner apparently does not deny that when the federal liens were perfected, the taxpayer-mortgagor had an interest in the mortgaged property to

which the liens attached. It contends only that since under California law the foreclosure sale terminated the mortgagor's rights, it also divested the federal liens that had attached to the mortgagor's property. This is basically the same argument as in *Brosnan* (and subject to all of its infirmities) that because non-judicial state foreclosure procedures eliminate non-government junior liens, they also wipe out subordinate federal liens. It is immaterial whether the subordinate interest that state law eliminates through foreclosure is the lien of a junior creditor, or the remainder interest of the mortgagor. In either case, as we have shown in the *Brosnan* brief, the state procedures do not eliminate the federal lien, which may be discharged only in accordance with the federal statutory provisions therefor.

Petitioner's contention that the decision below treats it unfairly is without merit. For the United States recognizes that petitioner's prior claim must be fully satisfied before it is entitled to anything on its junior lien. Petitioner's argument is basically only the complaint that it is not permitted to retain any excess over the amount actually necessary fully to satisfy its claim against the mortgagor.

2. Petitioner's attack on the holding below that it could not clear its title pursuant to 28 U.S.C. 2410 misconceives the scope of that ruling. The court below did not hold that petitioner could not maintain this action to quiet title under Section 2410, but only that its title was not clear since the state foreclosure proceedings did not eliminate the federal liens. The

court further held that petitioner could not affirmatively clear its title in this proceeding, since a title may be cleared under Section 2410 only through foreclosure in a judicial action in which the United States would have one year to redeem. Since petitioner here merely sought a "declar[ation] and adjud[ication]" (R. 7) that the United States had no interest in the property, it failed to meet these requirements.

ARGUMENT

I

THE JURISDICTION OF THE DISTRICT COURT

In the court of appeals, the United States contended that the district court had no jurisdiction to entertain this action to quiet title. The court of appeals rejected the argument. Upon further consideration, the Government has decided not to press the point in this Court. However, since the question is not free from doubt, we shall indicate briefly the considerations that support the court of appeals' ruling, and also the contrary arguments.

This action was brought against the United States in a California state court under 28 U.S.C. 2410, to quiet title to property to which federal tax liens had attached. That Section provides that, under the conditions therein prescribed "for the protection of the United States", the latter

> may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal prop-

> erty on which the United States has or claims a mortgage or other lien.

It gives the United States the right to remove any such action instituted in a state court to the federal district court;[2] and provides that, where a sale of real estate is made to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem." It further provides for the administrative extinguishment (by government officials) of "a [federal] junior lien, other than a tax lien," that attaches to real or personal property on which there is a prior "duly recorded" lien.

As originally enacted in 1931, Section 2410 applied only to foreclosure actions on realty, not to suits to quiet title. The House Committee Report on the bill pointed out (H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1–2) that the legislation has been recommended

> in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an impasse. It is impossible

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[2] Pursuant to this provision, the United States removed this action to the district court. Whether that court had jurisdiction, however, depends on whether the state court initially had jurisdiction.

> for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien * * *.
>
> The purpose of this bill is to provide a simple and just method of proceeding in such cases, one which is fair to the holder of the prior lien on the real estate and which amply and fully protects the rights of the Federal Government. * * *

Section 2410 was amended in 1942 by the insertion of a phrase which extended the consent of the United States to be sued to "quiet title" actions in addition to foreclosure actions.[3] This change was made at the suggestion of Attorney General Jackson who, in a letter quoted by the Senate Committee (S. Rep. No. 1646, 77th Cong., 2d Sess., p. 2), stated that "under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien"; that "persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished," and that "mortgagees have foreclosed on property and have failed to join the United States"; and that "justice and fair dealing would require that a method

[3] The mortgage foreclosure provisions were also extended to cover mortgagees on personal property.

be provided to clear real-estate titles of questionable or valueless Government liens."

1. In terms, 28 U.S.C. 2410 supports the holding below that the district court had jurisdiction It authorizes the United States to be made a party "in *any* civil action or suit * * * to quiet title to * * * property on which the United States has or claims a mortgage *or other lien*" (emphasis added). There is no exception for actions in which the lien of the United States is a tax lien. Moreover, when Congress in 1931 wished to exclude tax liens from the reach of the provision, it did so in explicit terms. Subsection (d) (*infra*, p. 27), which deals with extinguishment of liens through administrative action by government officials, applies only to "a junior lien, *other than a tax lien*" (emphasis added). Had Congress in 1942 intended similarly to limit quiet title actions, it presumably would have similarly so stated. Finally, this case involves one of the specific situation that Attorney General Jackson described as within the scope of the 1942 amendment—"mortgagees [who] have foreclosed on property and have failed to join the United States."

2. However, when Congress stated at the time of the original enactment of Section 2410 in 1931 that no procedure was available for removal of a valueless federal lien "for some debt due the United States," there were already in existence well-established procedures under the Internal Revenue Code

for removal of federal tax liens.[4] These procedures were equally applicable in 1942 when the Attorney General stated that there was no method for clearing federal liens available to "mortgagees [who] have foreclosed on property and have failed to join the United States." In the circumstances, the argument against jurisdiction is that the actions "to quiet title to * * * property on which the United States has or claims a mortgage or other lien" covered by Section 2410 were not intended to cover all liens, but only those for which there was no other method of removal, *i.e.*, non-tax liens. In other words, Section 2410 was not intended to duplicate the existing procedures for discharging federal tax liens.[5]

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[4] Those procedures, first provided in the Revenue Act of 1924 (43 Stat. 253), included the discharge of the lien by the Secretary of the Treasury or his delegate when the liability is satisfied or has become unenforceable, or a proper bond is furnished (Section 6325 of the Internal Revenue Code of 1954, *infra*, p. 22); the institution of an action in the district court by the United States, either on its own motion or at the request of the holder of a prior lien on or interest in property subject to a tax lien, in which the court shall "finally determine the merits of all claims to and liens upon the property" (Section 7403, *infra*, pp. 23–24); and the filing by such private person, if the Secretary refuses his request to institute suit under Section 7403, of a district court action "for a final determination of all claims to or liens upon the property in question" (Section 7424, *infra*, pp. 24–25). See discussion of these provisions in the *Brosnan* brief, pp. 11–13.

[5] Certain practical considerations also tend to support this view. In the instant case, petitioner could have filed suit in the district court under Section 7424 of the Code (*infra*, pp. 24–25); in such suit there could have been "a final determination of all claims to or liens upon the property in question" (Section 7424). In the Section 2410 proceeding, however, the court merely determined that the federal liens were not discharged in the state foreclosure proceedings; in order to remove

But the fact that another method for discharging tax liens was already available under the Internal Revenue Code does not necessarily establish that Congress did not intend to "prescribe alternative remedies for removal of a federal tax lien" (R. 69). The two procedures are different in at least one significant respect: Under the Code, recourse may be had only to the district court, whereas under 28 U.S.C. 2410 the suit may be instituted in an appropriate state court. Congress might well have decided to implement the existing federal court procedure by adding the state court suit.

3. Another argument against jurisdiction is based on the fact, as the court of appeals correctly held (R. 68), that Section 2410 is not an affirmative grant of jurisdiction to the district or state courts, "but simply waives sovereign immunity from suit."[6] Thus, the words "any State court having jurisdiction of the subject matter" in Section 2410 may be read as referring not to jurisdiction of the general subject

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petitioner will have to institute further proceedings. Quaere: is it likely that Congress intended to provide an alternative procedure which, if invoked, would not necessarily result in final settlement of the controversy?

[6] Accord: *Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906, 908 (C.A. 9); *Wells* v. *Long*, 162 F. 2d 842, 844 (C.A. 9); *United States* v. *Cless*, 254 F. 2d 590 (C.A. 3); *Remis* v. *United States*, 172 F. Supp. 732 (D. Mass.), affirmed, C.A. 1, No. 5538, January 6, 1960; *Tompkins* v. *United States*, 172 F. Supp. 204 (S.D. Texas); *Peacock* v. *United States*, 175 F. Supp. 645 (D. Idaho); *Haldeman* v. *United States*, 93 F. Supp. 889 (E.D. Mich.); *Gerth* v. *United States*, 132 F. Supp. 894 (S.D. Calif.); *Vincent* v. *P. R. Matthews Co.*, 126 F. Supp. 102 (N.D.N.Y.). Cf. *Coson* v. *United States*, 169 F. Supp. 671, pending on appeal (C.A. 9).

matter of quiet-title actions, but rather to jurisdiction in the sense of the subject matter of the specific litigation. Since the state court did not have jurisdiction over this particular litigation absent the consent of the United States, it would follow that it had no jurisdiction under 28 U.S.C. 2410.

An equally plausible explanation, however, is that Congress referred to state courts "having jurisdiction of the subject matter" to make it clear that the United States was not consenting to be sued in a state court that otherwise would not have jurisdiction of a quiet-title action. Since, as the court of appeals held (R. 67–68), the local court in which this action was instituted had jurisdiction under the California constitution over such suits, under this view the jurisdictional prerequisites of 28 U.S.C. 2410 would be met.

II

THE FEDERAL TAX LIENS WERE NOT REMOVED BY THE NON-JUDICIAL SALE OF THE PROPERTY UNDER THE POWER OF SALE CONTAINED IN THE MORTGAGES

The substantive issue in this case—whether a junior federal tax lien can be extinguished through a sale of the property by a prior mortgagee under a contractual power of foreclosure and sale contained in the mortgage—is substantially the same as that in *United States* v. *Brosnan*, No. 137, this Term, in which we have previously filed our brief. The only difference between the cases is that in *Brosnan* the property was sold in execution of a confessed judgment, while here it was sold pursuant to a power of sale. In our opinion, that distinction has no significance.

For the governing principle in both cases is that federal tax liens may be removed only in accordance with the specific and detailed procedures provided therefor by Congress; and that they cannot be discharged pursuant to state proceedings to which the United States is not a party, even though such proceedings result in eliminating non-Government junior liens. The Government's arguments in support of this position are fully developed in the *Brosnan* brief, and we shall not repeat them here. Accordingly, we discuss only the specific points that petitioner raises.

Petitioner foreclosed its liens by selling the property pursuant to the power of sale contained in the deed of trust and mortgages. In so doing, it admittedly fully complied with the requirements of California law, and under that law other junior liens would thereby be eliminated. Petitioner then instituted the present suit under 28 U.S.C. 2410. It was designated an action to quiet title (R. 4), and sought an adjudication that the federal Government no longer has any "estate, lien, right, title or interest whatever" in the property involved (R. 7–8). The theory of the suit was that "the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished" (R. 70; see Pet. Br. 7).

The court of appeals held (R. 78) that "the sale under the power contained in the mortgages * * * [did not give] the purchaser a title free and clear

of federal tax liens," since "a [federal] tax lien, even though junior to a mortgage * * * may be divested only with the consent of the United States and in the manner prescribed by Congress" (R. 76). The court further held that the bank could not clear its title under 28 U.S.C. 2410 (R. 74), since that Section requires, as "a condition of the Government's consent to be sued in any foreclosure * * * [thereunder,] a judicial proceeding in which the Government may assert its lien and the right of redemption within one year from the date of sale" (R. 77).

We submit that the court of appeals correctly held that the federal tax liens were not divested through the non-judicial sale of the properties pursuant to the powers of sale contained in the deed of trust and chattel mortgages. For, as the court stated (R. 73–74), "once the [federal] lien attached to the property, the Government had a right in the property which * * * could be divested only in a manner prescribed by Congress."

1. Petitioner apparently does not deny that when the federal tax liens were perfected, the taxpayer (the mortgagor) had an interest in the mortgaged property to which those liens attached. It contends (Br. 5) only that under California law "a sale pursuant to a power of sale effectively terminates the defeasible rights of the trustor under a deed of trust or the mortgagor under a mortgage and incidentally all rights of any subordinate lienholder"; and that "[by] virtue of the foreclosure sale, the taxpayer no longer has either 'property' or 'rights to property' in the land and chattels affected by this action." In

other words, petitioner's argument is that a federal tax lien that validly attached to a property interest of the taxpayer may be wiped out under state foreclosure procedures because, as against non-Government junior liens, the mortgagor's existing interest is eliminated by foreclosure of the mortgage under a power of sale.[1]

This argument is basically the same, and is subject to the same infirmities, as the argument in *Brosnan* that because non-judicial state foreclosure proceedings eliminate non-Government junior liens, they also wipe out subordinate federal tax liens. For it is immaterial whether the subordinate interest that state law eliminates through foreclosure is the lien of a junior creditor, or the remainder interest of a mortgagor. In either case, as we have shown in the *Brosnan* brief, the state procedures do not eliminate

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[1] Under California law, a mortgage creates only a security interest in, and does not pass title to, the mortgagee. *Schriber* v. *Alameda County-East Bay Title Ins. Co.*, 156 Cal. App. 2d 700, 320 P. 2d 82; *Power & Irrigation Co.* v. *Capay Ditch Co.*, 226 Fed. 634 (C.A. 9); Section 744, California Code of Civil Procedure, 17 West's Annotated Codes; Sections 2888 and 2924, California Civil Code, 11 West's Annotated California Codes.

A trust deed of the kind here involved "is in effect only a mortgage with a power of sale." 17 Calif. Juris., *Mortgages*, §§ 25, 542. The mortgagee's power to sell under a trust deed conveys no estate in the land. *Id.*, § 543. A junior mortagee has the right to redeem, and must be made a party to the foreclosure sale in order to remove his lien. *Id.*, §§ 568, 609. Where, as here, the mortgagee himself purchases the property at the sale, the mortgagor has the right to redeem. *Id.*, §§ 550, 554. See *Creditors' Remedies: Statutory Right of Redemption from Execution and Foreclosure Sales in California*, 45 Calif. L. Rev. 191.

the federal lien, which may be discharged only in accordance with the federal statutory provisions therefor. Petitioner's argument (Br. 4, 5) that California law treats the mortgagor's interest as "defeasible" is but another way of stating that under California law a mortgage foreclosure pursuant to a power of sale wipes out junior interests, including that of the mortgagor. But it does not similarly wipe out an existing federal tax lien.

Petitioner attempts (Br. 6) to analogize a junior lien on property that is subject to a prior mortgage to a lien upon a lease or an option, which ends when the lease terminates or the option expires. But in the latter cases, the property that is the subject of the lien itself ceases to exist after termination or expiration; the lien, therefore, necessarily expires along with the property. Here, however, it is the security interest that terminates upon foreclosure, and the underlying property subject to the mortgage remains unchanged. Since that property is subject to the second lien of the United States at the time of foreclosure, it continues subject to it after foreclosure unless the latter wipes it out. As we have shown, the state foreclosure proceedings do not have that effect.

Petitioner argues (Br. 8–9) that the decision below treats it unfairly. It contends (*ibid.*) that Congress "undertook to protect" its "deed of trust and chattel mortgages" in Section 3672 of the Internal Revenue Code of 1939, which provides that federal tax liens are not valid as against mortgagees, pledgees, purchasers or judgment creditors until they have been filed; and that the effect of the decision below is that its security position is "partially invalidated." But petitioner cannot claim any unfairness because the

junior federal liens are not discharged in the state foreclosure proceeding. For the United States has no claim against the mortgaged property unless petitioner's prior claims are fully satisfied, and once those claims are satisfied, petitioner has received the full measure to which it is entitled.

Section 3672 was designed to insure that the interests therein given protection would not be subordinated to a prior federal tax lien, the existence of which they could not ascertain when their own interest was created. It was obviously not intended to protect the tenuous interest that the mortgagee here relies on: the claim that "foreclosure by power of sale" is "the most expeditious and economical means of realizing on its security" (Pet. Br. 9). Petitioner's argument is basically only the complaint that it is not permitted to retain any excess over the amount necessary fully to satisfy its claims against the mortgagor.

Petitioner's complaint (Br. 9) that the decision below "gives to the Government greater rights than Taxpayer itself had" rests on the misconception that because federal tax liens attach only to property of the taxpayer, the United States, in asserting such liens, stands in the taxpayer's shoes. For if the rights of the United States did not rise higher than those of the taxpayer, the federal tax lien would never have priority. See Anderson, *Federal Tax Liens—Their Nature and Priority*, 41 Calif. L. Rev. 241, 250-252. Cf. *United States* v. *Bess*, 357 U.S. 51, where the Court held that federal tax liens attached to the cash surrender value of life insurance policies held by the decedent taxpayer at the time of his death, even though he had not exercised the right to surrender them.

2. Petitioner also challenges (Br. 10–13) the ruling below that it could not clear its title pursuant to 28 U.S.C. 2410. But petitioner misconceives the scope of that ruling. The court below did not hold, as petitioner states (Br. 10), that it could not maintain an action under that Section. Rather, the court ruled that the Section 2410 action would lie, but that petitioner was not entitled to a determination that the Government had no interest in the property, since the state foreclosure proceedings did not, in fact, wipe out the federal liens. The court further held that the bank could not eliminate the liens in the Section 2410 proceeding.[8] It pointed out (R. 74) that "in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption"; and it concluded (*ibid.*) that petitioner could not "do indirectly what it could not do directly," *i.e.*, eliminate the federal liens without giving the United States the rights upon which it had conditioned its consent to be sued under Section 2410. Here petitioner's complaint met neither of these conditions (foreclosure in a judicial action, and the right to redeem within one year), but merely sought a "declar[ation] and adjud[ication]" (R. 7) that the United States had no interest in the property involved.

[8] The court below may also have relied upon the provisions of Section 2410 in reaching its conclusion that the state foreclosure proceedings did not wipe out the federal liens. As we pointed out in our *Brosnan* brief (pp. 11–26), the lien discharge provisions of Section 2410 are one of the methods provided by Congress for the removal of federal liens and, together with the specific lien-removal procedures of the Internal Revenue Code, indicate that Congress intended the federal provisions to be the exclusive method for extinguishing federal liens.

Accordingly, the court of appeals correctly ruled that the federal liens could not be eliminated in this proceeding, but only by following the procedures specifically designated for that purpose by Congress. And, as the court pointed out (R. 74), petitioner "is not without remedy," since it can now still invoke several of those procedures.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1960.

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*The court stated (R. 74) that petitioner, in addition to proceeding under the Internal Revenue Code, "can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410." Since petitioner has already foreclosed its mortgage under state law (albeit without discharging the federal tax lien), it is difficult to see how it could now maintain a foreclosure action, unless (1) the failure to discharge the junior federal lien means that no foreclosure has taken place, or (2) petitioner can still maintain an action to foreclose the federal lien. Moreover, insofar as the real property is concerned, it appears that petitioner could not foreclose. Under California law the holder of a deed of trust with a power of sale (unlike a mortgagee) cannot institute foreclosure proceedings; it can realize on its security only by exercising the power of sale. 17 Calif. Juris., *Mortgages*, Sec. 25.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Internal Revenue Code of 1954:

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) *Liability satisfied or unenforceable.*—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

(2) *Bond accepted.*—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

(b) *Partial Discharge of Property.*—

(1) *Property double the amount of the liability.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority to such lien.

(2) *Part payment or interest of United States valueless.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

(A) there is paid over to the Secretary or his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

(c) *Effect of Certificate of Release or Partial Discharge.*—A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 6325.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United

States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States.

(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(26 U.S.C. Sec. 7403.)

SEC. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) *Obtaining Leave to File—*

(1) *Request for institution of proceedings by United States.*—Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the

property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) *Petition to court.*—If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) *Court order.*—After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) *Adjudication.*—Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) *Costs.*—All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.

(26 U.S.C., Sec. 7424.)

28 U.S.C.:

§ 2410 [As amended by Sec. 119, Act of May 24, 1949, c. 139, 63 Stat. 89, 105, and Section 12(h), Act of July 7, 1958, 72 Stat. 339, 348]. *Actions affecting property on which United States has lien.*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United

States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any

case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner's Reply Brief

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I, KENNETH M. JOHNSON, one of the attorneys for BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of February, 1960, I served copies of the attached Petitioner's Reply Brief on the several parties as follows:

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by mailing four copies to the Solicitor General and four copies to the Assistant Attorney General by enclosing said copies in envelopes addressed as indicated above with airmail postage prepaid and by mailing a copy to the United States Attorney enclosed in an envelope addressed as indicated above with first-class postage prepaid.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

POINT 1—The Basic Issue Is: To What "Property" Did the Government's Lien Attach?

Throughout its brief, the Government has used the term "property" indiscriminately, referring sometimes to the land and chattels (e.g., Br. pp. 6, 13, 14, 17) and sometimes to the defeasible interest of Taxpayer in the land and chattels (e.g., Br. pp. 5, 15, 17). The Government fails completely to answer Bank's basic argument that Taxpayer did not have any "property or rights to property" in the land and chattels after the foreclosure sales.

The Government is correct in stating Taxpayer "had an *interest*" in the land and chattels when its lien attached (Br. pp. 4, 15). The Government is wrong in assuming that the lien attached to the land and chattels (Br. pp. 16, 17). The lien attached only to Taxpayer's interest. The Government's insistence that its tax lien had to be "extinguished" or "wiped out" (Br. pp. 2, 4, 8, 14, 15, 17) is thus based upon a wholly unsound premise. The Government also speaks of "other junior liens" being eliminated by foreclosure (e.g., Br. p. 14). Actually, it is the trustor's right to a reconveyance of the land, upon payment of his debt, that is eliminated.

Bank's argument is not "that a *federal tax lien* that validly attached to a property interest of the taxpayer may be wiped out under state foreclosure procedures * * *" as the Government states (Br. p. 16). Bank's argument is that the *property interest* of Taxpayer was terminated by the foreclosure sales, although the federal tax lien remains fully effective as to any property and rights to property which Taxpayer continues to own. Of course the practical result is the same. But the Government here is not seeking a practical result. It is urging an exceedingly strained construction of its statutory rights, one which has no regard for costs or financial hardships to prior creditors and is unsupported by evidence of practical benefit to the Government.

The Government undertakes to distinguish a lien on the interests of a lessee or option holder (Br. p. 17), but the distinction is invalid. The Government concedes its lien on a lease or option interest *necessarily* expires when the lease or option expires because "the subject of the lien itself ceases to exist." Yet it asserts its lien on the interest of a trustor is not affected by foreclosure because "the

property" in which Taxpayer had an interest "remains unchanged."

Obviously land or chattels on which a lease or option has expired remain as unchanged as do land or chattels on which a mortgage or deed of trust has been foreclosed. It is the taxpayer's interest which disappears in both cases. The Government's lien attaches only to the taxpayer's interest in either case.

(a) No "excess proceeds" are in issue in this case. The suggestion that there were "excess proceeds" is unsupported by the record.

The Government introduces additional confusion by asserting that Bank's complaint is only "that it is not permitted to retain any excess over the amount actually necessary fully to satisfy its claim against the mortgagor" (Br. pp. 6, 18). This assertion is untrue. It is unsupported by the record in any way. The land and chattels affected by this action are described in detail (R. pp. 9-18). Bank sued to quiet title to the land and chattels as a purchaser at foreclosure sales. The proceeds of the foreclosure sales are not involved. Bank has never claimed any excess proceeds. The Government has not previously suggested that excess proceeds were realized at the foreclosure sales. The record does not indicate that any excess proceeds were realized.

(b) The issue here is not whether Bank could have proceeded in another way, but whether the statutes authorized the procedure followed.

On page 20, footnote 9 suggests that Bank could not now sue to foreclose; and, indeed, that it never could have. If this suggestion were correct it would hardly advance the Government's argument. In the interest of accuracy, however, we note that the law is to the contrary on both points of footnote 9. *Bank of America v. United States*, 84 F. Supp. 387 (S.D. Cal. 1949), permitted maintenance of an action

to foreclose a federal tax lien after a power of sale foreclosure proceeding had been completed. As to that portion of the note stating that a deed of trust with a power of sale may not be foreclosed in a court proceeding the law is clearly to the contrary. California Code of Civil Procedure Section 725a provides:

> "The beneficiary or trustee named in a deed of trust * * * upon real property or any interest therein to secure a debt or other obligation * * * shall have the right to bring suit to foreclose the same * * *."

This suit is here not because it would have been *impossible* for Bank to proceed in any other way, but because the requirements of reasonable efficiency and economy in the conduct of American business require the use of the most efficient and economical procedures for enforcement of legal rights. The Congress in 1942 expressly authorized the procedure here used, as pointed out in our main brief (pp. 10-12). The availability of an archaic, cumbersome, wastefully expensive and dilatory alternative procedure is no reason for ignoring that statutory amendment.

POINT 2—The Interest of the United States Is No Greater Than Taxpayer's Was When the Lien Attached.

The Government takes the absurd position that its rights rise higher than those of Taxpayer (Br. p. 18).

Although our opening brief deals with this point (pp. 4, 5) some additional comment seems appropriate in view of the Government's statement.

The lien which the United States asserts reached only "property and rights to property * * * *belonging to*" Taxpayer. Internal Revenue Code of 1939, § 3670 (28 U.S.C. 1952 ed., § 3670).

The limitation upon the Government's interest is made clear by the provisions for enforcement by distraint on a taxpayer's property. Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.) Sections 3690 through 3697 provide for the enforcement of tax liens by distraint on personal property. Distraint on real estate is provided in Sections 3700 through 3706. The levy under Section 3692 is "upon all property and rights to property" except those exempted by Section 3691. The end result of distraint proceedings on personal property is a certificate of sale which "Shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; * * *." Section 3697(b). Distraint on real estate results in a certificate of purchase at the time of sale and, after a one-year redemption period, a deed upon the surrender of the certificate. Section 3704 (c)(2) provides "* * *such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto."

It seems self-evident that the Government's tax lien reaches the same "property and rights to property" whether the Government chooses to foreclose by an action or by distraint proceedings. If the Government had foreclosed by distraint on the real estate and chattels affected by this action, thereby vesting "all property and rights to property" of Taxpayer in a purchaser, clearly Bank could thereafter foreclose its deed of trust and chattel mortgages by exercising its powers of sale. *Mansfield v. Excelsior Refining Co.*, 135 U.S. 326.

Can it be reasonably argued that the Government's tax lien reaches "property and rights to property" of a taxpayer that are not vested in a purchaser by a distraint sale? The

Government actually makes such an argument when it suggests (Br. p. 18) that the rights of the United States do rise higher than those of a taxpayer.

The *Mansfield* case, however, gave a negative answer. It decided in favor of Mansfield whose title was claimed by virtue of a purchase under a deed of trust power of sale. It decided against Excelsior whose title was claimed by virtue of a purchase at a distraint sale conducted under statutes similar to those cited above. The deed of trust was subject to (1) a lease (expired) to the taxpayer (a delinquent distiller) and (2) a "waiver" which gave the United States a first lien (not foreclosed). This Court stated at page 339:

> "We are of opinion that the collector's sale in the summary mode prescribed in § 3197 passed, and under the statute could have passed, nothing more than the interest of the delinquent distiller. When the collector distrains and sells personal property for taxes, his certificate, by the express words of the statute, (§ 3194,) transfers to the purchaser the right, title and interest of the *delinquent* in the property sold. When he sells real estate for taxes, the statute, in terms equally explicit, (§ 3199,) declares that his certificate of purchase shall be considered and operate as a conveyance of the right, title and interest the *party delinquent* had in the real estate so sold."

Cases in which a taxpayer holds a fee at the time the lien of the Government attaches are clearly distinguishable. *Blacklock v. United States*, 208 U.S. 75, 88-89. There, this Court clearly spelled out the difference between the Government's right in distraint proceedings to dispose of the whole fee where the taxpayer owned an unencumbered fee, as he did in the *Blacklock* case, and its limited right to dispose of only a leasehold interest where that was all the taxpayer owned, as in the *Mansfield* case.

In *United States v. Kaufman*, 267 U.S. 408, 414, on the issue whether a lien for taxes of a partner reached partnership assets, this Court held that "under its very terms the lien includes only the property of the person owing the tax; and in the case of a partner owing an individual tax, it extends only to his interest in the surplus of the partnership property."

United States v. Bess, 357 U.S. 51, does not support the Government's contention. The decedent taxpayer had an unquestioned right at the time of his death to the cash surrender value of the insurance policies involved. The tax lien attached before his death. This Court held that part of the proceeds involved represented the cash surrender value. The Government's demand for a greater interest than the taxpayer had (the proceeds in excess of cash surrender value) was denied.

The Government's contention that a policy of uniformity in federal tax law (Brosnan Br. p. 26) prohibits foreclosure under power of sale is without merit.

When the Congress imposed a lien on the property of delinquent taxpayers "it took for granted * * * as it normally does in the tax law, the vital existence of state laws creating and maintaining various interests." *Fidelity & Deposit Co. v. New York City Housing Auth.*, 241 F.2d 142, 144 (C.A. 2d 1957). Uniformity of federal tax lien law does not require the property law of every state to be the same as every other state; rather Congress has created a lien which reaches the interest of a delinquent taxpayer, whatever that interest may be, but without increasing or decreasing that interest.

In *R.F.C. v. Beaver County*, 328 U.S. 204, the issue was whether real property taxes could be assessed on heavy machinery owned by a government corporation but leased

as part of a plant to a private corporation by a lease providing the machinery should remain personalty. A federal statute authorized such taxation of "real property." The Government contended uniformity required that "real property" be construed to mean what is generally regarded as real property. This Court rejected the Government's uniformity argument, stating at page 210:

> "We think the congressional purpose can best be accomplished by application of settled state rules as to what constitutes 'real property,' so long as it is plain, as it is here, that the state rules *do not effect a discrimination against the Government*, or patently run counter to the terms of the Act. Concepts of real property are deeply rooted in state traditions, customs, habits, and laws. Local tax administration is geared to those concepts. To permit the States to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend." (Emphasis added.)

In the *Estate of Spiegel v. Commissioner*, 335 U.S. 701, this Court accepted the determination of the lower court that under state law the settlor of a trust had a right of reverter, with the result that the value of the corpus of the trust at the settlor's death was held includable in his gross estate for purposes of federal estate tax. It is certainly implicit in the opinion that if under state law the decedent had no possibility of reverter the corpus of the trust would not have been includable in the gross estate for federal estate tax purposes, with the resulting diminution of federal estate tax.

Similarly in *Poe v. Seaborn*, 282 U.S. 101, this Court held state community property law applicable to permit a husband and wife to file separate income tax returns, each

for one-half of the husband's income, resulting in a reduced federal income tax.

POINT 3—The District Court Had Derivative Jurisdiction on Removal.

The Government's position on the question of jurisdiction is ambiguous. The Government failed to file any cross-petition for certiorari and did not mention the question of jurisdiction in its memorandum filed in response to Bank's petition. Indeed, the Government says it "has decided not to press the point in this Court" (Br. pp. 4, 7). Yet, the Government presents arguments on this question (Br. pp. 4, 7-13). As we are in doubt whether the Government is presenting the point, the following comment seems necessary.

The Superior Court of the State of California is a court of general jurisdiction and has jurisdiction of actions to quiet title. This is conceded by the Government (Br. p. 13). Jurisdiction is established by Cal. Const. Art. VI, Sec. 5.

The United States has waived its sovereign immunity in all actions "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien" subject only to its right to remove such actions as are commenced in a state court to the appropriate United States district court. 28 U.S.C. § 2410; *United States v. Morrison*, 247 F.2d 285, 290 (C.A. 5th 1957).

The jurisdiction of a district court upon removal is derivative. *Petroleum Carrier Corporation v. Carter*, 233 F.2d 402, 404 (C.A. 5th 1956); *United States v. Anglin & Stevenson*, 145 F.2d 622, 627 (C.A. 10th 1944) cert. denied 324 U.S. 844; *Pendleton v. Bussey*, 30 F.Supp. 211, 213 (W.D. Va. 1939); *United States v. Mid-Continent Petroleum Corporation*, 67 F.2d 37, 42 (C.C.A. 10th 1933).

The Government's concession (Br., p. 10) that 28 U.S.C. § 2410 in terms supports the holding that the District Court had jurisdiction seems a complete answer to the other arguments urged by the Government. "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65.

The Government's conclusion (Br. pp. 10-11) that Section 2410 might not have been intended to extend to actions affecting tax liens results from an inaccurate reading of H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1 and 2, and S. Rep. No. 4646, 77th Cong., 2d Sess. The House report does not say *no procedure* was then available; rather, it says a mortgagee could not bring about a *judicial* sale and that "there is no method" by which the United States may be made a party to a foreclosure action.

Similarly, the statement in S. Rep. No. 1646, that there is no provision whereby the owner of real estate may clear his title, can only have reference to quiet title actions. It may not be construed as saying *no procedure* was available because the very section which it was proposed to amend already permitted clearing of titles to real estate by joining the United States as a defendant in a foreclosure action.

That Congress intended Section 2410 to reach all liens of the Government, including tax liens, was reaffirmed in the enactment of Internal Revenue Codes of 1939, § 3680 (26 U.S.C. 1952 ed. § 3680) and Internal Revenue Code of 1954, § 7425 (26 U.S.C. § 7425). Both sections expressly refer to what is now 28 U.S.C. § 2410 as permitting actions against the United States.

Section 2410 waives sovereign immunity and permits actions against the Government only in courts having juris-

diction of the subject matter. If, as the Government argues (Br., pp. 12-13), jurisdiction of subject matter is dependent on consent of the Government to be sued, then the enactment of Section 2410 accomplished nothing. Under the construction suggested by the Government a court would not have jurisdiction before enactment of Section 2410 because the Government had not consented to be sued. It would not have jurisdiction after the enactment of Section 2410 because the consent to be sued is conditioned on pre-existing jurisdiction of the subject matter.

CONCLUSION

The land and chattels affected by this action passed to Bank free and clear of any lien of the United States. Accordingly the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

Dated: February 19, 1960

Respectfully submitted,

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petitioner's Supplemental Memorandum

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Following are additional authorities illustrating the variety of situations in which the principle (Pet. Br. 5) has been applied that state law determines the extent of taxpayer's property:

United States v. Winnett, 165 F.2d 149, 151 (C.A. 9th, 1947);

United States v. Flood, 247 F.2d 209 (C.A. 1st, 1957);

Raffaele v. Granger, 196 F.2d 620, 623 (C.A. 3d, 1952);

Minnesota Mut. Life Ins. Co. v. United States, 47 F. 2d 942 (N.D. Tex., 1931).

Following are additional authorities clarifying the nature of a transfer of title by a deed of trust under California law:

Bank of Italy National Trust and Savings Association v. Bentley, 217 Cal. 644, 654, 656, 20 P.2d 940 (1933), *cert. den.* 290 U.S. 659;

Higley v. City of Sacramento, 149 F. Supp. 118, 121 (N.D. Cal., 1957).

Following are additional authorities illustrating the variety of situations in which federal tax liens have been held ineffective to seize rights greater than those owned by the taxpayer:

Reiter v. Kille, 143 F. Supp. 590 (E.D. Pa., 1956);

United States v. Dickerson, 101 F. Supp. 262 (E.D. Mo., 1951);

See aso:

Jackson v. Lawrence, 117 U.S. 679, 682;

Scott v. Paisley, 271 U.S. 632, 635.

Dated: March 18, 1960.

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